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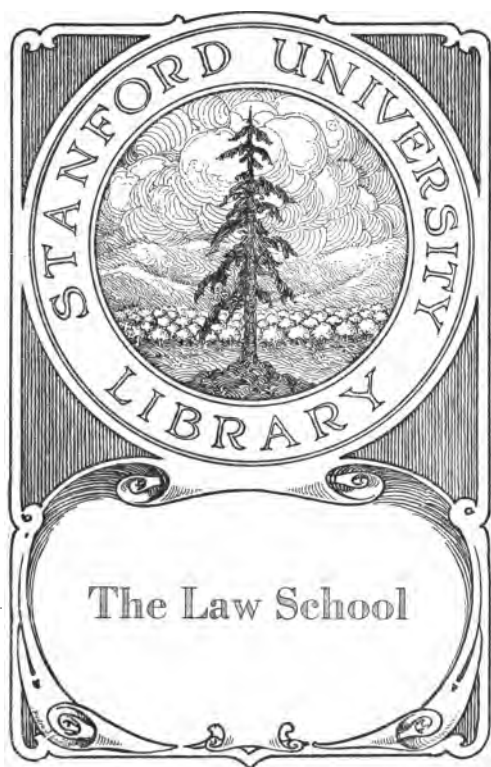
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EXCHANGED

PROCEEDINGS

OF THE

Washington State Bar Association

THIRTEENTH ANNUAL SESSION

Held at the City of Spokane, July 9th, 10th and 11th, 1901.

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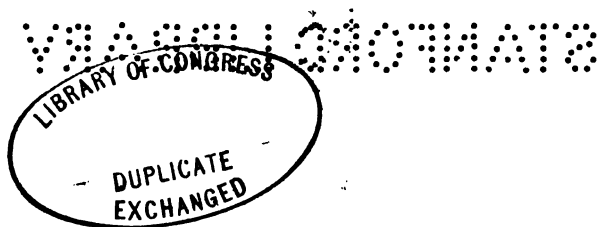
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AUG 19 1932

The Fourteenth Annual Session
of the
Washington State Bar Association
will be held in the
City of Ellensburg, beginning on August 5, 1902,
at 10 o'clock a. m.

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OFFICERS.

<i>President,</i>	AUSTIN MIRES,	Ellensburg.
<i>First Vice President,</i>	R. G. HUDSON,	Tacoma.
<i>Second Vice President,</i>	WILLIAM A. PETERS,	Seattle.
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McGilvra, O. C.,	Seattle.
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Mount, Wallace,	Sprague.
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Nuzum, Richard W.,	Spokane.
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Parker, James H.,	Hoquiam.
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Pickrell, J. N.,	Colfax.
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Pratt, John Watson,	Seattle.
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Preston, George H.,	Seattle.
Quinn, Patrick F.,	Spokane.
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Reid, George T.,	Tacoma.

Reinhart, C. S.,	Olympia.
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Roberts, John W.,	Seattle.
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Root, Milo A.,	Seattle.
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Rudkin, Frank H.,	North Yakima.
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Sawyer, A. P.,	Spokane.
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Shank, Corwin S.,	Seattle.
Sharpstein, W. C.,	San Francisco.
Shaw, A. C.,	Davenport.
Sheeks, Ben.,	Tacoma.
Shepard, Chas. E.,	Seattle.
Shepard, Thomas R.,	Seattle.
Shine, P. C.,	Spokane.
Shippen, Joseph,	Seattle.
Slauson, Howard B.,	Seattle.
Smith, Solomon,	Cathlamet.
Smith, Eben,	Seattle.
Smith, Del Cary,	Spokane.
Smith, Winfield R.,	Seattle.
Snell, Marshall K.,	Tacoma.
Snell, Bertha M.,	Tacoma.
Southard, Frank S.,	Seattle.
Staser, C.,	Ritzville.
Stern, Samuel R.,	Spokane.
Stiles, T. L.,	Tacoma.
Stoll, W. T.,	Spokane.
Strickland, R. E. M.,	Spokane.

Struve, Henry G.,	Seattle.
Sullivan, P. C.,	Tacoma.
Tallman, Boyd J.,	Seattle.
Taylor, E. W.,	Tacoma.
Taylor, E. Win.,	Spokane.
Thayer, W. J.,	Spokane.
Thompson, Will H.,	Seattle.
Tillinghast, P.,	Tacoma.
Tolman, Warren W.,	Spokane.
Town, Ira A.,	Tacoma.
Townsend, W. F.,	Spokane.
Turner, George,	Spokane.
Turner, W. W. D.,	Spokane.
Voorhees, C. S.,	Spokane.
Voorhees, Reese H.,	Spokane.
Wakefield, W. J. C.,	Spokane.
Walker, George H.,	Seattle.
Warburton, S.,	Tacoma.
Warren, W. T.,	Wilbur.
Warner, Clyde,	Ellensburg.
Waugh, J. C.,	Mount Vernon.
Weir, Allen,	Olympia.
Wells, S. A.,	Spokane.
Wheeler, L. H.,	Seattle.
Whited, Kirk,	Wenatchee.
Whitson, Edward,	North Yakima.
Wickersham, James,	Tacoma.
Wilhelm, Honor L.,	Seattle.
Williams, James A.,	Spokane.
Williams, Louis,	Seattle.
Wilson, Lester S.,	Walla Walla.
Winfree, W. H.,	Spokane.
Winstock, Melvin G.,	Seattle.
Zent, W. W.,	Ritzville.

PROCEEDINGS.

SPokane, WASH., July 9, 1901.

The Washington State Bar Association met in annual session, in the city of Spokane, at the United States Court room, Auditorium building, and was called to order by Hon. Samuel R. Stern, president.

There were present: Hon. Samuel R. Stern, president; Austin Mires, first vice-president; Nathan S. Porter, secretary, and a quorum of members.

THE PRESIDENT—The first order of business is the reading of the record of the proceedings of the preceding annual meeting.

MR. FORSTER—Inasmuch as the record of the proceedings of last year's session has been printed, and is in the hands of all of the members of the Association, I move that the reading thereof at this time be dispensed with.

Motion carried.

THE PRESIDENT—We now come to the most unfortunate, for you, part of our proceedings—the reading of the president's address.

MR. FORSTER—There are so many absent who will probably be in attendance this afternoon, would it not be better to adjourn till that time?

THE PRESIDENT—My personal preference would be to read what I have to suggest now, but I desire to yield to the wishes of those present.

On motion of Mr. Kreider, the Association adjourned till 1:30 P. M.

AFTERNOON SESSION.

SPOKANE, July 9, 1901.

Association met at 1:30 P. M. and was called to order by the president.

The following named attorneys were balloted for, and duly elected to membership in the Association:

W. L. Allen, Harris Baldwin, Richard M. Barnhart, W. E. Cullen, R. J. Danson, W. S. Gilbert, Chester Glass, W. G. Graves, Thomas B. Higgins, J. D. Hinkle, George F. Holland, C. K. Holloway, Charles W. Hoyt, H. L. Kennan, Chas. P. Lund, Fred Miller, Adolph Munter, G. M. Nethercutt, Burton J. Onstine, John A. Peacock, W. D. Scott, W. C. Stayt, W. J. Thayer, W. F. Townsend, Warren W. Tolman, S. A. Wells and James A. Williams, of Spokane; Frank H. Rudkin, of North Yakima, and M. F. Gose, of Pomeroy.

THE PRESIDENT—There are two matters to which I desire to call your attention—more by way of a pleasantry, and which I hope may not be deemed out of place, even in an Association like ours.

While coming to this court room, a friend of mine stopped me and asked what the badge I had on signified, and I could not help but say, after considering this morning's attendance, that it was the "Red Badge of Courage."

However, the present attendance cannot be complained of, especially when I consider the fact that it is known that the President's address is to form one of the features of the afternoon program.

Some of our courts are still in session, and I apprehend we will have a larger attendance to-morrow.

My attention has also been called to the dates on our badges—they are dated June 11-13,—a month behind, but I trust it will not be significant of the character of the papers read. In fact, I know that you will be highly entertained and instructed by those who follow me.

The first matter that will come before you this afternoon, is the reading of the President's address. (See Appendix.)

I do not quite remember whether it has been the practice or not to discuss the President's paper, but all I need to say is that I should be glad to have it discussed and criticized, as I know it deserves to be criticized.

JOSEPH SHIPPEN—Mr. President and Gentlemen: Among the numerous points made in the President's address, I note one which I will take issue on, and that is in regard to the requirement of payment of jury fees by the plaintiff. What brief experience I have had within the last few years, in California, it seems to me causes a reversal of the principle of *magna charta*. When the plaintiff had to pay about \$30 a day to keep the case in court, I don't know how many days, of short hours, and perhaps the jury would be excused on some minor pretext, all of which worked a hardship; and I do not want it adopted in Washington.

Another suggestion of the President, that I fully concur in, is the effect and value of oral argument in courts. Some years ago, in the State of Illinois, the principle of dividing the commonwealth into three districts was broached. The judges of these three districts took the transcripts home and each one came to a conclusion as to what disposition ought to be made of the case. That was the oral argument. The judges were on the bench to determine that.

WILLIAM M. EVARTS expressed his very hearty and profound protest and said: "In the long run, it would injure and destroy the force and effect of the judiciary of the commonwealth if we adopted it permanently. In public speech—friction of mind with mind—was the strong point with the bar, and for the benefit of the community."

And if any delay occurred, that delay was of little injury, compared with the destruction of forensic skill in presenting the argument.

I fervently agree with the President. John Marshall, on whom we all looked with such profound respect and love, always desired to hear a case presented from both sides, unwilling to decide the case submitted until he had heard the pros and cons of the principles presented for judicial consideration discussed.

MR. MUNTER—Gentlemen: As to the effect of oral argument, in preference to briefs, and as compared with written briefs, I would say I fully appreciate that, perhaps more so than most of you, because I have more often served them. I nevertheless admit its merit. I am surprised that our President, who is usually so practical in everything he advocates and advances, should here advocate something that is so fully out of the question as the removal of the Supreme Court to the city of Spokane. There are many obstacles in the way of it. One is that a number of the Eastern Washington lawyers are glad to have the occasion and excuse, occasionally, to go over to the Sound and inhale the salt breeze there; and, secondly, any one who has been over there will feel, I believe, that those lawyers on the other side of the mountains would never consent that we should be permitted to stay at home and make our arguments. At least I judge so from expressions I have heard from them and the treatment I have received. I believe they never would consent to have a law that will say we may stay at home and have our case submitted by briefs for the Supreme Court; and last, but not least, I do not believe that Captain Doane will ever consent.

THE PRESIDENT—Are there any remarks to be made on the President's address? If not, I take great pleasure in introducing to you a gentleman that perhaps needs no introduction from me, who is to read a paper on a subject that at this time is particularly apropos. The very question involved in this paper—I do not know which side he is going to take, but hope it will be my side—comes up to be heard before Judge Belt, and I believe it is a subject we are all very much interested in; that is the trust fund theory of corporations, and I now introduce Judge Kellam.

Judge Kellam then read before the Association his paper on the "Trust Fund Theory of Corporation Assets." (See Appendix.)

THE PRESIDENT—The chair finds it necessary before suggesting that Judge Kellam's paper form a subject for discussion, to say a word in his own defense. Judge Kellam has so recently come from the highest appellate tribunal of the State of Dakota, that he is still laboring under the delusion that whatever comes from the highest court must be understood—and I might say understood by all alike. Unfortunately, that does not happen to be the case.

I think we all labor under that kind of delusion when we attempt to show the Superior Court that our Supreme Court held so-and-so.

The Superior Court, however, does not always agree with our interpretation, and that is why the same question again goes to the Supreme Court. Perhaps, after reading Judge Kellam's paper, both our Superior Court and Supreme Court may think it wise to change the rule heretofore announced.

I have the very question to argue in the morning in the Superior Court, and hope it will entertain Judge Kellam's views.

MR. NASH—Mr. President and Gentlemen: I once upon a time bucked up against this trust fund doctrine, and had it not been for the decision of the Supreme Court, in *Conover v. Hull*, I would have made a substantial fee. It is not on that account, however, that I am against the Supreme Court in *Conover v. Hull*. My views are fully in accord with Judge Kellam's paper on that question. There is no doubt about it at all. The U. S. Supreme Court has struck the right key, and they are right in the matter. The decision in *Conover v. Hull* would have been a great opinion, had it not gone too far. The vice of the whole business is simply this: That the corporation becomes a subject of the trust fund theory as soon as it is declared insolvent, or in failing circumstances, and that all is brought about by an attachment as a rule, and upon that attachment is founded a creditor's bill, with a list of corporation assets, and this corporation I speak of was in splendid circumstances, but could not meet its obligations according to the definition of solvency as administered by the court; and had it been allowed to take care of its property, and make some preferences, it would have been in fine circumstances, and would have resumed business. The U. S. Supreme Court has rejected the theory absolutely, and they are right. In the first place, the U. S. Supreme Court will not tolerate attachment suits and a creditor's bill, involved in one suit as a legal and equitable action. If we had been in such a shape, and the law had been administered as it is in the U. S. Courts, where there could not have been a combination of two such suits, it would not have been the result.

The U. S. Courts have decided that it is not until the assets of

a corporation come into the possession of the court that they can be considered as a trust fund, but in this State, just as soon as an attachment is issued, a corporation becomes subject to the control of the Court of Equity, and a receiver is appointed, although it might be in sufficient circumstances, if let alone, to pay all its obligations. But a creditor, it makes no difference how small a claim he may have, may come along and absorb the assets of the corporation and destroy the entity of the corporation. Uniformity of the law is a thing we are striving for all the time. And when the Supreme Court of the United States have determined a question of general law, it would seem to me that a State court ought not to be supreme in that particular, but it should follow the decision of the Supreme Court of the United States, and if that were true, we would have no such anomaly as *Conover v. Hull*.

In reason and theory, *Conover v. Hull* ought not to stand the test of right reasoning, as administered by the Supreme Court of the United States, and when the Supreme Court of our State will adopt the decisions of general law as administered by the Supreme Court of the United States, we will be in a better situation, and all the lawyers can feel safe.

THE PRESIDENT—Are there any other members of the Association who desire to speak on this paper? If not, I wish to say that I purposely omitted calling the regular order of business, because I was anxious that all the lawyers should hear Judge Kellam's paper.

We will now resume the regular call of business.

The next order of business will be the reports of the officers.

The Secretary then read the reports of Secretary and Treasurer, as follows:

SECRETARY'S ANNUAL REPORT.

OLYMPIA, WASH., July 8, 1901.

To the President and Members of the Washington State Bar Association :

GENTLEMEN—I have the honor to submit, for your consideration, this, my annual report for the year ending June 30, 1901 :

Number of members as per last report	230
Number joined since last report	18
Total	248

Dropped for non-payment of dues.....	22	
Withdrawn	1	
Died	1	24
Present membership		<u>219</u>
Cash received from 13 members, admission fee.....	\$65	00
Cash received for dues	108	00
Cash received, donation from King county bar.....	206	15
Cash paid treasurer	<u>\$379</u>	<u>15</u>

FINANCIAL STATEMENT.

Cash balance as per last report.....	\$145	75
Cash from secretary.....	379	15
Total	<u>\$524</u>	<u>90</u>
Paid warrants, 17 to 21 inclusive	262	31
Balance cash on hand	<u>\$262</u>	<u>59</u>

NATHAN S. PORTER, *Secretary.*REPORT OF THE TREASURER OF THE WASHINGTON STATE
BAR ASSOCIATION, JULY 9, 1901.

Cash in hands of W. A. Peters, Treasurer, as shown by statement of July, 1900	\$145	75
July 11, 1900, received from Secretary	59	00
July 18, 1900, received from Secretary	98	00
September 20, 1900, received from Secretary.....	206	15
May 9, 1901, received from Secretary	16	00
July 12, 1900, by paid warrant No. 14.....		\$27 61
September 15, 1900, by paid warrant No. 18.....		191 00
September 17, 1900, by paid warrant No. 19		25 00
October 4, 1900, by paid warrant No. 20		10 20
May 8, 1901, by paid warrant No. 21.....		8 50
July 9, 1901, by cash on hand.....		262 59
	<u>\$524</u>	<u>90</u> <u>\$524</u> <u>90</u>

REPORT OF EXECUTIVE COMMITTEE.

SEATTLE, WASH., May 8, 1901.

Executive Committee met at the office of Vice-President Peters, in the city of Seattle, Vice-President W. A. Peters presiding.

Bill of Secretary for printing circulars relative to celebrating John Marshall Day, and for printing applications for membership and for pos-

tage and other incidental expenses amounting to \$8.50, was audited and paid.

The following named writers were selected to prepare articles to be read before the Association at its meeting on July 9, 1901, at Spokane, upon the following subjects:

T. O. Abbott, of Tacoma, "The Advantages of the Torrens System of Conveyancing."

Judge A. G. Kellam, of Spokane, "The Trust Fund Theory of Corporation Assets."

Joseph Shippen, of Seattle, "The Insular Questions and Their Solution by the Supreme Court of the United States."

E. G. Kreider, of Olympia, "Law Reporting."

W. T. Dovell, of Walla Walla, "The Rule of Liability in Personal Injury cases."

George E. De Steiguer, of Seattle, to choose his subject.

No further business appearing, the committee adjourned.

N. S. PORTER, *Secretary*.

On motion of Senator Turner, the Association adjourned until 10:30 o'clock A. M. to-morrow.

SECOND DAY.

SPOKANE, WASH., July 10, 1901.

Association met at 10:30 A. M., President Stern in the chair.

THE PRESIDENT—The next business in order will be the reading by Mr. Charles A. Murray, of Tacoma, of an obituary upon the death of one of our members :

Mr. President and Gentlemen of the Washington State Bar Association:

Your Committee has to report the death of William Hugh Pritchard, of the Tacoma Bar, and a member of this Association.

IN MEMORIAM.

WILLIAM HUGH PRITCHARD.

When this Association gathers in annual meeting, it ever becomes necessary to record the death of some member which has occurred during the year, and in making such record it is seemly that the Association should likewise give expression to such comments of respect as are due to the departed member, not in platitude, but in just tribute to real worth.

When the bar of a State shall thus have said of one as may be said of Judge Pritchard,

“He did much to be praised,
Little to be forgiven,”

that one has lived well.

When, on the morning of Sunday, the 19th day of May last, the people of Tacoma read that Judge Pritchard had, that morning, died at Olympia, they were profoundly shocked. Accustomed as his acquaintances and business associates were to absences of a few days on professional business, it seemed to them that he had not even gone out from among them, and the news of his death was sudden indeed. A large proportion of the people of the State shared in the feelings of surprise and regret produced by the news, prominent as he was, and general as was his acquaintance.

William Hugh Pritchard was born in Worthington Township, Richland County, Ohio, on the 18th day of July, 1850, and died at Olympia, May

19, 1901. He was born and reared on a farm. His family were Presbyterian, and he connected himself with the Presbyterian church at an early age, and remained a communicant therein until his death. His boyhood and early manhood seem to have been characterized by such endeavor and resolve as have marked the lives of so many who, by their own effort, have achieved much in life. Indeed, the story of his youth, with changes of names and dates and places, is that which we have heard over and over again concerning those who have filled high places in the nation.

He received a common school education. He taught the district school of the county, and with the means thus obtained sought a higher education, and attended the academies, first at Haysville, and later Greentown at Perrysville, Ohio. He studied with such success that he was employed as an assistant at the academy, and continued in that capacity during his preparatory course, and entered college at Denison University, afterwards graduating with high honors from the University of Wooster in the class of 1874. He then returned to Greentown Academy, having been called by the board of directors as one of the faculty in that institution, and there remained for one year, and in the succeeding year was elected superintendent of the public schools at Shelby, Ohio, to which position he was re-elected, and in which he gave evidence of splendid ability as an instructor. During this time he was studying law, and in 1878 was admitted to the bar by the Supreme Court of Ohio. Immediately thereafter he began the practice of law at Mansfield, Ohio, where the firm of which he was a member achieved marked success. In 1884 he came to the then Territory of Washington and located at Colfax, in Whitman county, where he immediately distinguished himself as a lawyer of more than ordinary ability. In 1888 he changed his residence to Tacoma, and resided there with his family until his death.

Of the esteem in which he was held by his professional associates, no better demonstration can be given than to quote from the report of a committee composed of eminent lawyers, which report was adopted and spread upon the records of the Superior Court of Pierce county a few days after his death. Of him the committee said :

"His knowledge of law, acquired by studious industry, won for his office the leading practice in Pierce county, and placed him among the leaders of the bar of the State. His distinction as a lawyer was the result of his ability to apply the principles illustrated by decided cases to the particular facts of the case in hand. He was pre-eminent among his associates for accurate knowledge of the vast volume of judicial decisions from the beginning of English law to the present time.

"On the 18th day of August, 1890, at a meeting of the lawyers of Pierce county, for the purpose of naming three candidates for the office of judge of the Superior Court, Judge Pritchard was nominated on the first ballot, and received the votes of almost all those in attendance. In view of the fact that twenty gentlemen were voted for on that occasion, it may safely be said that a greater compliment has rarely been paid an attorney by his associates at the bar. Although Judge Pritchard

felt that he was making a sacrifice in so doing, he acquiesced in the action of this meeting, and was elected and served four years as judge of this court. During his service on the bench he displayed conspicuous ability in the performance of his duties.

"His charges to juries were models of clearness and perspicuity, and have not ceased to attract the attention of the bar of the State.

"After his retirement from the bench, Judge Pritchard rendered valuable professional services to the City of Tacoma as its attorney. His service in this capacity covered a period of two years.

"His life ended at Olympia on Sunday, May 19, 1901, after an illness of only a few hours. In common with the community in general, the bar of Pierce county deplores his death. In losing him, the State loses one of its most able and eminent lawyers.

"We, his associates, testify to his kind and tender heart as a man, to his splendid learning and ability as a lawyer, to his faithfulness to his clients, and to his uniform courtesy in his intercourse with his fellow men

"We can say of Judge Pritchard, as he on a similar occasion said of another, 'He was a learned and able lawyer, a courteous and honorable gentleman, and possessed all those sterling qualities that characterized a manly man. By his death his clients have lost an able champion of their rights, the bar of the State a distinguished member, his fellow lawyers a worthy and genial friend, and the public a valuable and useful citizen.'

"JOHN A. SHACKLEFORD.

"D. J. CROWLEY.

[Signed.]

"B. S. GROSSCUP.

"WALTER M. HARVEY.

"R. B. LEHMAN."

Judge Pritchard was called in the fullness of his physical strength and mental powers, prematurely it does seem; but we cannot tell when death's summons will come. All that pertains to that mystery called death is as mysterious now as when the first mortal breathed his latest breath. We fondly hope that death brings rest.

A writer of a former time has told that there was once

"In a broad realm of beauty beyond measure,

A city fair and wide,

Wherein the dwellers lived in peace and pleasure,

And never any died.

Disease and pain and death, those stern marauders,

That mar the world's fair face,

Could not encroach upon the borders

Of that bright dwelling place.

No fear of parting, and no dread of dying

Could ever enter there;

No mourning for the lost, no anguished crying

Made any face less fair."

And he tells how,

“Hurrying from the world’s remotest quarters,
A tide of pilgrims flowed,
Across broad plains, and over mighty waters,
To find that blest abode.”

And how,

“Many years rolled by and found them striving
With unabated breath ;
And other years still found and left them living
And gave no hope of death.

But listen, hapless one, whom angels pity
Craving a boon like this—
Mark how the dwellers in this wondrous city
Grew weary of their bliss.

One and another who had been concealing
The pain of life’s long thrall,
Forsook their pleasant places, and came stealing
Outside the city wall.

Craving that wish that brooked no more denying,
So long had it been crossed,
The blessed possibility of dying,
The privilege they had lost.

Daily the current of rest-seeking mortals
Swelled to a broader tide,
Till none were left within the city’s portals
And graves grew green outside.

Would it be worth the having or the giving,
The boon of endless breath ?
Ah, for the weariness that comes of living,
There is no cure but death.

Ours were indeed a fate deserving pity
Were that sweet rest denied,
And few, methinks, would care to find the city
Where never any died.”

MR. KREIDER—Mr. President and Gentlemen: I move that this report be spread upon the record and published in the proceedings of the Association.

Motion carried.

THE PRESIDENT—I have to report that Mr. Abbott, who was to read a paper this morning on the practical advantages of the Torrens system of conveyances, has been unavoidably detained in

Tacoma, but has sent his paper here, and it will be read by Mr. W. S. Gilbert, of this city.

MR. GILBERT—Mr. President, I deem it an honor to read a paper prepared by Mr. Abbott, and I trust that none of its effectiveness will be lost by its being read by some one other than its author. (See Appendix.)

THE PRESIDENT—Gentlemen, the paper is very properly a subject for discussion at this time, if any of you wish to discuss it.

MR. SHIPPEN—Mr. President, I would like to ask what states have adopted this system, except Illinois.

MR. QUINN—Ohio has adopted it.

MR. SHIPPEN—Since when, Mr. Quinn?

MR. QUINN—Since the courts of Illinois have declared it unconstitutional.

THE PRESIDENT—If there is to be any discussion I will be very glad to entertain it.

The next order of business is the reading of another paper on law reporting. It has always been a mystery to me, and to some of the rest of you, no doubt, how the reporter managed to put a head on some of the decisions of our Supreme Court. Some deserve a head, but others—well, on them a syllabus seems sadly out of place. I have the pleasure of introducing E. G. Kreider, of Olympia.

(See Appendix.)

THE PRESIDENT—Gentlemen: I think after the bestowal by the author of so much research and careful preparation, it should receive some suggestions from the members of the Bar Association.

MR. TOWNSEND—Mr. President: I will talk for a little while in the hope of provoking discussion on another line of reporting. The paper just read is an excellent one, and I have no criticism to urge against it. The bare mention of that subject puts before the mind of every practicing lawyer a problem difficult to solve. We must either get larger heads and longer purses, or call a halt in the reporter system at some point. Publishers are pouring law books out like baled hay. They come from every direction and in all shapes, sorts and sizes. Four-fifths of the decisions reported are repetitions of doctrines already announced, and the attempt to array them in new garb frequently confuses, if it does not obliterate.

ate, the essential points involved. There is a laudable ambition upon the part of judges of courts of last resort to stamp their identity upon the jurisprudence of the land. In an effort to bestow new treatment upon subjects which have already been exhaustively treated, quotations and elaborations carry the opinions to great length, and in many instances, without intending to do so, announce doctrines which give rise to costly and yet hopeless litigation. The result is a swollen stream of reports which menace the exchequer and sanity of the profession.

When I entered upon the practice twenty-two years ago, to have characterized one as "a case lawyer" would have been deemed a reproach. He who did not make pilgrimages to the great sources of elementary law and drink at the common fountain was regarded as an interloper and time server. To-day, by reason of an endless mass of reported briefs and court opinions, we are overwhelmed with cases deciding numberless vital questions in different ways, which we thought were settled years and years ago. I start out to investigate some matter submitted to me. The walls of the library are lined with reports. I recall the elementary doctrine which I think determines the controversy. I find decisions which assure the footing I have assumed. On the next shelf, I encounter a line of adjudications that storm my fortress. I proceed to plough through the books, and in a day or so find myself in need of a fog horn to secure a rescue boat and reach the starting point again. This may not have been your experience, but it is mine.

Yesterday I had the pleasure of listening to an exceedingly able and interesting paper by Judge Kellam, on the trust fund theory as applied to corporations. Every lawyer who heard it must have appreciated the research, the patience, and the ability required in its production. I am in accord with the conclusions arrived at, notwithstanding the fact that they appear to be at war with the adjudications on that subject in this state.

On every hand one hears the expression that the weight of authorities are so and so. It goes without saying that it is exceedingly difficult, to-day, to determine the state of the law touching very many common, and yet important, propositions, which have been settled, changed, re-settled, and changed again. Like the

fabrics of a dream, the shiftings carry us into surroundings that bewilder and confuse.

I concede the far-reaching importance of having legal doctrines settled right, and the improbability of bringing all men to see alike. But both personal and property interests require some accepted and unassailed foundation upon which to rest. I am not so egotistical as to pretend that I am able to propose a remedy for the condition of affairs that I have sought to portray.

For many years past the Supreme Court of the State of Ohio has followed the practice of affirmance or reversal of cases on the doctrines announced in some decision theretofore rendered by that court. The advantages to our profession and to the people at large, from the adoption of such a course, becomes apparent upon the mere statement. The reports are greatly diminished in numbers, and the practitioner who familiarizes himself with the scope and meaning of the guiding opinion is in a position to advise clients with some assurance that he understands what the holdings of the court will be on that branch of the law which must determine the questions submitted to him.

As before stated, this talk is outside the pale of discussion of the able paper just read, but to my mind the departure is justified by the grave and pressing importance of the matters to which I have humbly endeavored to direct the attention of this Association.

MR. BATES — Mr. Chairman: I want to say just a word on this splendid paper that has just been read. It seems to me the gentleman who has just spoken has got a little out of the line of the paper, and some of his remarks might go to the opinions of the courts.

MR. TOWNSEND — I said I had no criticisms of the paper.

MR. BATES — I said you had got a little out of the line of the paper. The only thing I feel like suggesting at this time is the matter that came up in our county last week. An appeal was taken to the Superior Court from the Justice of the Peace Court, and the notice of appeal that was served did not have any file mark on it, and on the strength of the case in the 13th Washington, one of our judges dismissed the appeal because the copy that was served did not have the filing mark of the Justice of the Peace on it. That was under that statute that requires a notice of appeal

to be filed and served. Now, it was not necessary in that case, nor do I think the Supreme Court decided in that case in 13th Wash., that a copy must necessarily have the filing mark, for they based that decision on a case in 10th Washington, which was a case of filing and serving a statement of facts on appeal from the Superior Court to the Supreme Court; and following 10th Wash., they say it was necessary to file this before they served it. Then they go on and say that it is necessary for the copy to have the file mark upon it. Now, our Superior Court dismissed that appeal from the Justice Court. Now, in 22d Wash., in passing upon the question of filing mark, that matter was raised in the Supreme Court in a case where the copy that was served did not have the filing mark, and the Supreme Court passed that by as not worthy of discussion, and decided that if the paper is filed before the copy is served that is all that is necessary—the fact of having the filing mark upon the copy, there is not enough in it to discuss it. In 13th Wash. they say that a notice of appeal from a Justice Court to the Superior Court must have the filing mark on. Now, I suggest, if the reporter, in the case in 22d Wash., would simply say, in reporting, that, “This overrules 13th Wash.,” or something of that kind, it would assist us a good deal.

You take it in this state, in the case of *Geiger v. Geiger*, a contempt case. *Geiger* was fined for contempt in a divorce case for not paying alimony. And he was adjudged to spend thirty days (I think) in the county jail. Now that was appealed without putting up an appeal bond. On the strength of that a case went up from our county—what was the name? The first was *Milligan* against a publishing company, for they held that a criminal proceeding. On that decision they appealed the *Geiger* case without putting up an appeal bond. And yet the court dismissed the appeal, because the appeal bond was not put up. Now they do not overrule the *Milligan* case, but if the reporter, in reporting the *Geiger* case, would say: “While the court says there may have been some expression in the *Milligan* case which would seem not to be in line with this discussion, still they do not overrule that case; the case they do overrule is a civil case, and you have got to put up a bond.”

Let the reporter, if he is going to write a syllabus, make a note

and query, that it does not overrule the *Milligan* case. That would give us a lot of help, and I concur with the remarks of the gentleman who preceded me, but, as I said, he goes, I take it, largely to the decisions of the court. I could cite other instances, which you all know, that follow these decisions, not only in this state but in other states.

Take matters that are talked of a good deal. What is known as the "*Rands law*," in regard to cases of the United States Supreme Court. What is known as the *Medley* case, and what is known as the case that went with that one from Minnesota—the *Holton* case. I discovered, on examining the notes of the Federal decision, the mistakes in those two cases.

The *Medley* case says the state of Colorado inflicting, in addition to the death penalty, that a prisoner shall be confined in the penitentiary in solitary confinement, invalidates that law.

The *Holton* case, taken up from the State of Minnesota for that law, says a man must be hung at the state penitentiary and must also be kept in solitary confinement. There was no evidence that he was kept in solitary confinement, so they say he must be properly executed. We get that from the notes of the *Holton* case. Now, if the reporter would say, put it "query," if you want to, it would call it then to the attention of the attorneys in looking matters up. Now, in that case, if the Supreme Court would simply say, we are of opinion "this case is in line with the case of *Jones v. Smith*, therefore we affirm or overrule it;" but the reporter in reporting may put in the word "query," and some of the lawyers would investigate it. The only thing I suggest regarding the reporting of these matters—I call the attention to only these cases that come to my own attention—the reporter might say: "See this case," if it conflicts, or, "does it overrule it?" and in that way call the attorney's attention to the matter.

THE PRESIDENT—I will make this suggestion: that as this paper seems to be exceedingly interesting, and it is the usual time to adjourn, we adjourn, and renew discussion this afternoon; and I want to say further, that the only other paper to be read this afternoon, and probably this session, is a paper to be read by Mr. Shippen, of Seattle, upon our insular possessions.

Mr. Shippen has prepared a paper of considerable length, and

has gone to a great deal of trouble and research, and I would like to see everybody here this afternoon. It will be the last meeting at which papers will be read.

MR. KREIDER — I would like to say a word just now, that is, I appreciate the discussion of Mr. Bates, of Tacoma, and my intention in writing this paper was to provoke discussion. Any remarks made here in a candid spirit of criticism will be appreciated and not resented by me. I want the members of the Association to feel free to offer any suggestions, because I am rubbing up against them on purpose to see where we can get together for our mutual benefit; and even if the discussion takes the line of criticism, I shall take no offense, at all.

MR. SHIPPEN — As I have the field, and shall occupy the greater part of the afternoon, I would like to make a few suggestions in regard to this paper; perhaps it is out of line in regard to the paper; but it is in regard to text books.

Now, the professors at the Harvard Law School have introduced the system of case study, and they have carried it, I think, to an absurd length. A young gentleman in Seattle went to that law school; he was very anxious to become a lawyer, and wanted to get into the college, and was examined by the Supreme Court of California and passed. I said to him, "Take that book, and this book, and study them, and you will pass." He said, "They would mark me down if they saw me with those books, and if I were to study them I would have to read them in secret, for if they saw me learning definitions in Blackstone they would mark me down. We are tied to cases, and not allowed, under their authority, to study text books, but are confined to the study of cases alone." Some of us did not learn our Blackstone in that way. Some lawyer in Kansas said case law was "a condemned nuisance."

Another suggestion: There are books, no end of them; and the idea of any lawyer trying to keep up with all the reports — it would bankrupt him, unless he had some of these great transcontinental lines of railroad behind him. The great law buildings furnish law libraries. The New York Equitable Life building has an admirable library — a restaurant on one floor, and a law library on another, both convenient, perhaps. In San Francisco there are several buildings identified as law buildings. There is the Parrot

building, where the Supreme Court occupies the sixth floor for a library for the use of tenants, and tenants alone. Then, again, the Mills building is a building well worth a million dollars, and they have an admirable library, and on the door is printed in large letters, "Nobody admitted but tenants." Of course, courtesy is extended to non-residents. They seem to be well supplied with libraries; that seems to be one remedy; but how is it in a hustling town like Spokane? There ought to be a law library here. Is not that a true solution of this matter of so many reports being given out? A gentleman said in Congress, in regard to trust legislation, "How legislation is unwisely effected you know." Many of you have listened to this question on the ability of lawyers to form legislation. There are many great men, but they are nearly all lawyers. Mr. Blaine is one of the exceptions. He was not a lawyer in the first place. If the lawyers would kindly emphasize this, and if the citizens would feel that the judges occupying the benches, and lawyers of the bar all have need in the public interests of being educated well in the principles of law and jurisprudence, it would be better for the administration of law and justice, and in maintaining our free constitutional government. There is not a text book lying on your table and mine, but the judges of the courthouse ought to have access to, and you ought to have access to them. After the civil war, was over in St. Louis, we had a big library, and had to pay so much a year to keep it up in the courthouse. I remember a young colored man was admitted to the bar, but was not admitted to this law institute. There were those practicing at the bar who protested against the colored man being allowed to use the books of that library; and my mind revolted, and I thought, can it be possible, if I have a case against a fellow citizen, that I had a right to go before the judiciary with the use of these books, and thereby be prepared to meet the intelligence of my opponents, and yet forbid it to him?

I am getting beyond the range of the subject presented in the paper; but the point in my whole remarks that I would like to make is, that the Bar Association, National and State, ought to have libraries in capitals and great cities, in courts of last resort, and federal courts, and at the public expense, which would be far less than it is now in the desultory way of having buildings with

libraries run at private expense, establishing those libraries in cities and lawyers spending much of their income in paying for books. For when you buy a book one day, you have difficulty in disposing of it the next day, at half its original cost.

Motion by Judge Kellam to adjourn until 2 P. M. Carried.

AFTERNOON SESSION.

SPOKANE, WASH., July 10, 1901, 2 P. M.

THE PRESIDENT—Gentlemen: At the conclusion of the morning session the admirable paper of Mr. Kreider was under discussion. Before proceeding with the regular order of business, do any of you wish to discuss that paper further? Are there any further remarks?

While we are waiting for some of the other members of the Association to come, I might be able to fill a little niche here and kill a little time with a suggestion or two upon the paper that was read. It is in my opinion one of the ablest papers that has ever been presented to the Association since I have been connected with it, in that it shows that careful preparation, and gives us an insight into the modern methods of reporting, and what is now deemed to be good and bad reporting; but I want to make a suggestion as to what I think is an instance of under-reporting and over-reporting, and I can best illustrate it by calling your attention to the case of *Dormitzer v. German Savings and Loan Association*, being the most recent approach to what seems to me a case of over-reporting; and unless the members of the bar, either through the Association, or otherwise, call attention to matters of that kind, I do not believe the evils are going to be corrected.

While it is true, that the Justice who wrote the opinion in that case was new to the bench, he had the same experience we all have had in reading cases and buying and paying for books, and ought to have had some commiseration for us. Padding is very much in vogue in getting up some reports. I do not mean that in regard

to our own reports; I agree with the gentleman that said that "there are different kinds of reporting." But take the case of *Dormitzer v. German Savings and Loan Association*. It commences on page 862 of 62d Pacific, and runs to page 892, covering 30 pages of the small type used in the reporter's system, long columns at that; and I don't know—I haven't looked to see how much it covers in our own reports—

MR. KREIDER (interrupting)—It will take about ninety pages of the next volume.

And yet it is made up of about ninety pages, and I should say one-half of it consists of the testimony taken verbatim from the record.

Now, to the decision involved in that case, so far as it interested a lawyer and settled a principle of law, there is no need, it seems to me, in such full quotation in the opinion, or in such reporting. Cannot the court state what the facts were in substance? Of course, it is not the fault of the reporter, we understand, but it seems to me an association of this kind can call attention to these facts without intending to give, or giving, offense to the court, through the instrumentality of the reporters, and it will have a good effect, possibly.

Now, let me call attention to under-reporting, if that expression is proper. Some years ago I brought an action, just a few days after the statute of limitation had commenced to run, against a debtor to whom I tried to be lenient, as I always am where the debtor is disposed to pay the debt, and the summons in that case did not happen to be a copy of the summons served, only because it did not have my name signed to it, although there appeared in numerous places on the papers, for instance in the subscription to the complaint, and the printed matter on the cover, my name, showing that I was attorney for the plaintiff; my postoffice address was also noted; the person upon whom it was served could not have been misled. Some time later a default judgment was rendered, no appearance being made by defendant. The defendant moved to quash, on the ground that the court had no jurisdiction to grant judgment on account of this defective summons. As I say, the only defect seemed to be that the summons did not hap-

pen to be signed, although the name appeared in the other places on the papers. The court heard the motion to quash, and set aside the judgment. In fact, he hit me with a double-barreled gun. Not only quashed the summons, but set aside all the proceedings.

Now, a case in 4th Washington, which I supposed was the settled law of this State up to recent times, had held that in a case where the court below refused to take jurisdiction, the proper remedy was to appeal to the Supreme Court for a peremptory writ of mandamus. So I carefully prepared my application, and went to Olympia to appear in person before the Supreme Court, as I thought the fault was in my office, and I ought to leave no stone unturned to correct the error. Before the court opened, I called on one of the judges to pay my respects. I noticed quite a pile of briefs upon his table, and I said: "You seem to have lots of work." He said: "Yes, but I am pretty well up with my work now." He said: "We have just made a ruling that is going to relieve us of a good deal of work." I said: "What is that?" He said: "We have just held in a case that writs of mandamus will not be heard where a regular appeal can be taken, and they must be brought up here like other appeals, and not be heard as motions, because, usually, we have not had time to properly consider these cases, nor were they as well prepared by the attorneys as they should have been." That hit me pretty hard. This was about twenty minutes to 10. I went out and ran over that opinion, which had only been promulgated a few days before. Now, under our system of reporting, it was not possible for you or me to have known of that decision unless we had been interested in the case, and asked the clerk to wire us in case of a decision. My opponent had not heard of that decision at all. I went in and addressed the court, and said, that one of their number had just informed me that a decision had been rendered in such and such a case, holding so and so. I said: "I assume your Honors will not hold me to that decision, as I could not have known that, having come from Spokane to correct an error that perhaps some one in my office may be responsible for, and I don't want to be held to that rule; and my opponent and I have carefully prepared ourselves, and are both willing to admit that we could not prepare better briefs if we tried, and the five judges put their heads together and decided

that I must be bound by their decision previously made. I said I could not have known anything about it; and in view of the fact that the application had been made in good faith long before that case was decided, and according to the law as both sides understood it, I ought to have my case heard; but they turned me down. On account of that case, and my expressions concerning it, I was put upon trial at the meeting of the Bar Association in Tacoma, two years ago, and charged with the offense of "loving the Supreme Court," to which offense I pleaded "not guilty," and was tried, and I believe found "not guilty." I thought at first my time to appeal might be limited, in view of the fact that it might be an appeal from an order, and I wired to my office to prepare the appeal immediately, and received in reply a wire stating that by looking at a case in 18 Wash., 450, I would find in *Carstens v. Leidigh & H. Lumber Co.*, that it was an order which finally determined the action, and therefore I had the same time for appeal as I had in a case of final judgment. I came back home, prepared an appeal within 60 days — I did not wait the full ninety days — elaborated the matter as much as I dared without trespassing on the patience of the Supreme Court, and went there a second time. I started in to argue the case on its merits, when my opponent raised the question that I had not taken the appeal within the time fixed by law; that it was an appeal from an order; and the five good men and true again put their heads together and decided it was an appeal from an order, notwithstanding the decision in 18 Wash.; and, although I am not saying it to criticise the Supreme Court, they had evidently forgotten the decision in 18 Wash., and they asked me to read it, and I not only read it once, but twice, and then one of the judges said: "What is that?" So I read it again. That case decided as clearly as a case could decide that an order quashing a summons, which was my case exactly, was an order finally determining an action. I felt I was right, and still think so, but I did not have the last say. They would not change their ruling, and my appeal was dismissed. Now, upon neither of those questions was there ever an opinion written; and when I called the attention of the lawyers at Tacoma to it (it happened just prior to the time the Bar Association met there) they said: "Is that reported?" I said: "No, the Su-

preme Court never wrote an opinion; whether it was because they thought it unimportant, or for what reason, I don't know." The lawyers said: "How are we to know when a case is decided, or how decided, when the Supreme Court in deciding matters of law do not hand down a decision?" It was more important, it seems to me, and for all the members of the bar to know, how they were going to hold in matters of that kind than to have twenty pages in a report, one-half going to testimony alone. That, it seems to me, is a case of under-done, not over-done.

The only reason I suggest these two matters is because it seems to me the paper read this morning was so timely, and that something could be done to correct the evils of which I have complained. We ought to know what decisions are rendered at Olympia, and know promptly. The Associated Press could not be used to a better advantage than to apprise members of this bar every time a decision is handed down, and to give the substance; else how are we to know that appeals are brought according to the latest views of the Supreme Court. We do not want to be caught in such a trap as I was the victim of. I am in favor of this Bar Association giving some expression of opinion as to whether or not we are entitled to have decisions reported as they are in many other states. While in Missouri a few weeks ago, when the Supreme Court of that state handed down decisions they were published all over the state. In New York state the same system is adopted, and we cannot pay the newspapers for any better services than that. Our local papers, too, I think, we have a right to find fault with. They fail to cover this important service, and it may be that their local representative at Olympia is at fault, but we certainly ought to have all the decisions. Possibly something may be accomplished by this Association at some future time, if not at this time, so that we may get the decisions of the Supreme Court promptly, and know what they are.

THE PRESIDENT—Is there any further discussion? Are there any persons who wish to apply for membership.

I want to announce that owing to some misunderstanding, Mr. Dovell, of Walla Walla, has evidently not prepared a paper. He accepted the invitation of the organization to read a paper at this meeting, and was given the privilege of choosing his own subject.

We have not heard from Mr. De Steiguer, who also agreed to read a paper, why he has not prepared one; so we will conclude with a paper in which I think we are all very much interested. It is one prepared by Mr. Joseph Shippen, of Seattle.

(See Appendix.)

THE PRESIDENT—In conclusion I want to thank the visitors who have come a considerable distance to be present. I want to thank the members of the local association who have supported me in my efforts, and have assisted me in endeavoring to entertain you at these proceedings; and to thank those members of the local committee who have been untiring in their efforts to get together some kind of an entertainment for you.

When men come as long a distance as have those who have addressed us, and when a man of such distinguished ability as the gentleman who has just spoken, a linguist, a lawyer, a literateur, a man who has spent weeks, probably, in the preparation of a paper of this kind, admirable as it is, and who reads it so admirably, and which, if delivered to the American Bar Association, would be received with great acclaim, I regret to say that the members of our local bar do not come to hear it. It sounds a note of discord, which never should have been heard, and to them the odium must attach. It has been their loss, not ours. I say this, because when in Seattle a year ago and in Tacoma two years ago, I saw the busiest lawyers listening to the papers and bestowing the courtesy of their presence upon the speakers; while here I find many have failed to come or take any interest in the affairs of the Association. To those that came I wish to say that I thank you. Our Superior Court has been represented by only one of our judges. As the gathering here comes but once in three years, I hope another time our Superior Courts will adjourn and give every lawyer a chance to come; and I think the members of our local bar can well afford to give a little time to the State Bar Association. I do not want to be considered a common scold, but the circumstances have warranted my saying what I have. It is to be regretted that our local bar should have given just cause for the provocation.

Adjourned until 10 A. M., July 11th.

THIRD DAY.

SPOKANE, Wash., July 11, 1901.

Association met at 10 A. M., President Stern in the chair.

MR. KREIDER — I would like to offer this resolution:

WHEREAS, The members of the King County Bar were so generous as to donate to this Association the sum of \$206.15 from the surplus funds remaining in the hands of their Entertainment Committee after paying the expenses connected with the reception and entertainment of the Washington State Bar Association, at its annual meeting held last year in the city of Seattle; therefore be it

Resolved, That this Association hereby extends its thanks to the King County Bar for this token of their appreciation of the work of this organization.

Moved that it be adopted. Seconded and carried.

THE SECRETARY — I have a resolution on the table:

Resolved, That the next annual meeting of the Washington State Bar Association be held in the city of Ellensburg, beginning August 5, 1902.

Moved that it be adopted; seconded and carried.

MR. TURNER — It is manifest that this Association has not received the attention of the bar of this city that it should receive. I wish openly to say that it has been a three-cornered concern, confined to Seattle, Tacoma and Spokane, and thereby, to some extent, has lost the interest of the State bar, and that is what we ought to recover. Moreover, confining it to these three cities, the bar of the city haven't as much time to attend as smaller cities of the State. I believe we are honored only with Judge Shippen and a few others from the Sound at this meeting, and last year our worthy President was the only one that attended from this city. Seems to me we ought to create a more general interest throughout the State, and the way to do that is to recognize the smaller bars of the State. Let them know that we propose to give them the same recognition in this Association that we wish for our-

selves; and by that means we will foster the pride of the local bars of the several cantons, and assist in building up a better organization than we have now. Moreover, Ellensburg is most in the center of the State, an educational town, and a better place to be accepted for meeting could not be found. I have been attending court in Ellensburg for sixteen or seventeen years, and know that they have a very large local bar, and know we could not accept any place in the State where we would be better treated than at Ellensburg; I know that by my own experience; and the last reason why this should be done, I think, if our distinguished associate who is now vice-president is to be elected president, it is very appropriate that we hold our next meeting at Ellensburg, under his eye, so he can take charge of the preparation for the Association.

MR. HEYBURN — I want to ask whether or not they are really having the meetings of the Association at the proper time of the year. Maybe the slim attendance is due to that fact. It is the time of year when people are taking their vacation, and many are out at the lakes. I want to suggest along the line of what our worthy president said yesterday; it does seem hard that there should not be enough intellectual stimulus in our lawyers, or enough interest taken in these things to induce them to be present at an address such as we had yesterday. Now, whether or not our Association has been giving too much attention, by way of suggestion, to mere petty entertainment that goes with it—whether or not the people have lost respect for the Association because the whole interest is not settled on intellectual matters. I say this, not by way of criticism, but because our president said something in regard to so many being absent, and I have been wondering what caused the slim attendance. It seems to me that once a year we should be able to have almost a full attendance of the State bar. If we have them too often let us have them once in two years, and have them right; and not only have such distinguished talks like the one from our brother yesterday, but have distinguished members from other States coming and giving us lectures, and say nothing about banquets and such things that have no weight or force.

THE PRESIDENT — If the chair may be permitted a word, I want

to make an additional suggestion to those made by Senator Turner and Judge Heyburn. I am personally in favor of going to Ellensburg, because I think Mr. Mires ought to be our next president; and furthermore, although we have had three representatives from Tacoma, none have appeared before this Association to invite us.

Are there any further remarks?

THE PRESIDENT—I hold in my hand a communication from Mr. Austin E. Griffiths, who is in Scotland and wishes to attend the National Law Association held there, and would like some credentials from this Association; and it would be a compliment as well as benefit to the Association, possibly, to recognize him in some manner. I bring the matter up for your consideration.

MR. QUINN—Any recommendation, I should judge, would come from the American Bar Association.

THE SECRETARY—This Association has never been represented at the National Bar Association. In the American Bar Association we generally elect three, and one of the three attends. We have been represented in the American Bar Association, but never, to my knowledge, in the National, and this appears to be National. This letter from Mr. Griffiths says that he is going there, and, if accorded the privilege, he will be glad to appear in Glasgow for and on behalf of the State Bar Association.

Moved that he be elected; seconded and carried.

THE PRESIDENT—The next order of business will probably be the selection of three delegates to the American Bar Association.

JUDGE SHIPPEN—I take pleasure in nominating Judge Hanford, of Seattle.

THE PRESIDENT—Are there any other nominations?

SENATOR TURNER—F. T. Post, of this city.

MR. HEYBURN—Charles A. Murray, of Tacoma.

THE PRESIDENT—Are there any other nominations? If not, I will declare the nominations closed. The motion has been made and seconded that the Secretary cast the ballot of this Association for the three gentlemen named.

Carried.

THE PRESIDENT—The next order of business is the election of officers. The ballot has been cast for the following named gentlemen to attend the American Bar Association: C. H. Hanford, F.

T. Post and Charles A. Murray. We elect a president, a first, second and third vice-president, a secretary and a treasurer. The first order of business will be the election of a president.

SENATOR TURNER—I take pleasure in nominating for president Hon. Austin Mires, of Ellensburg.

No other nominations for president. Motion seconded and carried.

THE PRESIDENT—The ballot is cast for Austin Mires, who is your next president. I would be glad to have Mr. Mires come up here.

MR. MIRES—I thank you, gentlemen, for the honor.

THE PRESIDENT—The next order of business is the election of a first vice-president. R. G. Hudson, of Tacoma, is now second vice-president.

THE SECRETARY—I place in nomination R. G. Hudson, of Tacoma, for first vice-president.

Ballot cast and R. G. Hudson declared first vice-president.

THE PRESIDENT—W. A. Peters was last year elected third vice-president.

THE SECRETARY—I nominate Mr. Peters for second vice-president.

Ballot cast and Mr. Peters declared second vice-president.

THE PRESIDENT—Third vice-president.

MR. ROCKWELL—I nominate Mr. P. F. Quinn.

Ballot cast and Mr. Quinn declared third vice-president.

Speech called for.

MR. QUINN—I will make mine after the banquet.

THE PRESIDENT—The next order of business is the election of a secretary.

THE SECRETARY—I take pleasure in nominating our present Supreme Court reporter, E. G. Kreider, of Olympia.

MR. KREIDER—I will consent that my name be used only in case our present secretary absolutely refuses to serve.

THE SECRETARY—That is exactly what it means.

Ballot cast and E. G. Kreider declared secretary.

THE PRESIDENT—This, gentlemen, I think, concludes the business portion of this Association. Are there any other suggestions any one wishes to make?

SENATOR TURNER—I wish to vote that we extend to the officers of the Association of last year the thanks of the Association for the courtesy and impartiality with which they tided over the business.

THE PRESIDENT—No thanks are permissible.

MR. ROCKWELL—I move that thanks be extended to the United States Court for the use of their court room. Seconded and carried.

THE PRESIDENT—The entertainment committee may have some announcements to make, and it might be well to make them.

MR. QUINN—The program arranged by the entertainment committee is that we take the car for a trolley ride through town for an hour or an hour and a half, then ride to the Natatorium, where we have provided bathing suits for those who wish to bathe; then luncheon, and afterwards, base ball, free drinks of all kinds, and cigars.

THE PRESIDENT—If there is no other business before the Association, the chair will make a motion to adjourn *sine die*.

Motion seconded and carried.

APPENDIX.

APPENDIX.

ANNUAL ADDRESS OF THE PRESIDENT.

BY SAMUEL R. STERN, OF SPOKANE.

An apology is due to the members of this Association for the utterly inadequate address which I have in great haste attempted to prepare.

The time necessary for proper preparation has not been vouchsafed me, and I can do little more than generalize, summarize briefly the work of our local Legislature, and suggest a few reforms, which I think might well be instituted within the limits of our own state, and possibly elsewhere.

As you did me the honor of inviting me to read a paper before you two years ago, I have deemed it both inexpedient and improper to inflict upon you another upon any special subject, and have contented myself with a few rambling suggestions, as they have occurred to me within the past few days.

No legislation of any special importance or interest to the citizens of our state was enacted by Congress during the past year, with the exception of the so-called Insular Bills, and as these and the interpretation of the Supreme Court of the United States will form the subject of a special paper to be read at this session, I would be invading the rights of others by making suggestions with reference thereto.

One gratifying feature which, however, should not be overlooked, is that the American people always let their patriotism

rise above their partisanship. Notwithstanding the fact that men of opposing political faith differed strenuously, and made their differences the subject of a heated political campaign, now that our Supreme Court has, though by a much divided bench, settled the law, we pursue the even tenor of our way, and the incident seems almost closed.

One other decision of the Supreme Court of the United States has been much discussed, and was awaited with a great deal of interest by the commercial world. I refer to the case of John T. Pirie *et al.* vs. the Chicago Title and Trust Co., and which interpreted the provisions of the new bankruptcy law prohibiting the allowance of claims in cases where payments had been made within four months of the filing of a petition in bankruptcy without repayment of these so-called preferences. The fact that the court was so evenly divided in holding such payments to be preferences shows that it was a very close question, and one concerning which lawyers and laymen might well differ. Personally, I believe that the bankruptcy law should be amended so that payments made in good faith to the creditors of the bankrupt need not be returned before a claim can be proved in bankruptcy.

I do not deem it wise to dilate upon the injustice done by these sections. There are so many reasons why they appear oppressive and inequitable that I am somewhat surprised that the business community has not taken more advanced ground towards securing an amendment to this portion of the law.

It is gratifying to report that there was a very general observance of John Marshall Day, not alone throughout the United States, but in our own state. In my judgment it would be wise to have a celebration of some kind annually, aside from the Bar Association meetings, in order that some event of special importance or the achievement of some great man in our profession, might be commemorated and the public at large suitably impressed. To the younger generation it might prove an education, and I am certain that some of us who have worked a decade and more in the professional harness can profit measurably thereby.

In the newer and less populous states where kaleidoscopic changes are continually occurring, there is an advantage in meeting our professional brethren frequently, which might not obtain

where the members of the bar have been more closely and for a greater period associated together in professional, social and fraternal capacities.

A little more *esprit de corps* will never harm the lawyers of this state.

Since the last meeting of our Association, the seventh session of the Legislature of our state has been held, and because of some of its errors of omission and commission, the unusual spectacle has been presented of the necessity for and the calling of a special session.

Perhaps the members of the late, but I fear not lamented, Legislature would prefer that the results, or possibly the dearth of results, should not be animadverted upon, and that we should say of it,

“Requiescat in pace,”

but as the result of their efforts must furnish legitimate food for reflection, I have concluded to call attention to a few of the things which it did and more of the things which it did not do. Only those which affect the state generally will be referred to.

It will probably take us some time to find out whether or not hanging is played out in our state, and the constitutional lawyer, or he who thinks he is a constitutional lawyer, will not busy himself with encouraging the enforcement of the laws that were passed, but in seeking to show that alleged quacks ought to practice medicine and dentistry without passing an examination or obtaining a license, something which a reputable and sufficiently qualified practitioner, or would-be practitioner, ought to be glad to do; that slot machines ought to continue to furnish expensive amusement; that a poll tax should not be collected; that any kind of a barber can scrape any kind of an acquaintance with you; that the seeds of discontent will be sown by the Seed Buyers bill; that we who never had any license to shoot, need obtain none, and that the various other laws which were passed are branded with unconstitutionality. It certainly looks, at the present writing, as if the last Legislature had in one respect at least been good to the lawyers; it will furnish employment to not a few.

Among the most important measures which have crystalized

into laws are those relating to the taxation of inheritances; the practice of medicine and dentistry; the new jury law; tampering with witnesses; the one providing for the temporary relief of the Supreme Court by giving us two additional justices; regulating the transfer of stocks of goods; a local assessment law; a board of control of state institutions; declaring the qualification of electors and guarding against the intimidation of voters; preventing cruelty to animals; establishing and maintaining free libraries; relating to beneficiary societies, and several much needed amendments and additions to our mining laws; regulating appeals to the Supreme Court; providing for drainage and sewage systems; prohibiting the adulteration of foods; and purchasing a new state capitol building. These, in my judgment, were some of the most important laws passed. One fourth of the legislative enactments consisted of appropriations and private relief bills. It frittered its time away in the enactment of some laws that will never be enforced, in providing for penalties which will never be collected, and in passing amendments which I believe in many instances do not amend. It probably cost more to pass and print the law regulating the sale of spectacles and eye-glasses than will ever be collected in licenses, or fines inflicted for the violation of it. Why time was spent in discriminating against the itinerant spectacle peddler to the exclusion of other fakirs, is yet to be explained. The man who sells you two ounces of water tinctured with "Guess-it-if-you-can" or some other harmful substance, may ply his vocation undisturbed, and he may sell his wares to the music of a brass band or tinkling cymbals, and yet go unmolested, but the poor little fellow who tries to sell you eye-glasses or spectacles must first obtain a license.

So solicitous, too, were the members of the rights of the farmers that it took thirteen pages of the session laws to pull the wool over the abused (?) rancher's eyes and to give him a bill to protect his sheep.

It strikes me that we are fast drifting to specialization in legislation. We discriminate constantly against one class of people or in favor of another. We are so much occupied in creating special commission and boards of some-thing-or-other that we lose sight of what is to the general advantage of the community at large. We

are legislating for the plumber, and yet omit the most vital part of such legislation by not regulating his charges. We legislate for the barber, yet fail to provide antiseptic shops or cleanliness of towels, limited conversation or onionless breath.

We legislate against the cigarette when used by the child under eighteen, as though age made the practice of smoking them any more healthful or agreeable, and the poor cigar and the vilest tobacco go unnoticed, while forms of vice that are a greater menace to the public health go unpunished.

But good sometimes results from evil. A step in the right direction was taken when witness fees to officials were legislated against, and a step further by refusing jurors per diem except for absolute and necessary attendance in a case on trial, would relieve our tax payers and make of jury service a public duty and not a matter of private emolument. It may be too early to introduce the successful system in vogue in other states, *i. e.* of compelling the plaintiff to advance the jury fees and to tax them as costs against the unsuccessful litigant, but I am nevertheless in favor of it. No greater check upon speculative and unmeritorious litigation can be provided.

I do not believe in mere ornamental organizations; results of a practical character are always to be desired. Better legislation would follow if this Association would keep its watchful eye upon the laws as introduced and passed. Three years ago I wrote to the secretary of this Association as follows:

“I would like to make a suggestion that a special committee on legislation be appointed, consisting of members of the bar residing at or near Olympia, whose duty it shall be to attend the next session of the Legislature to see that certain much needed amendments to our statutes, or the enactment of new statutes, is brought about. What our Association ought to do, aside from having a real good time at our annual reunion, is to accomplish something in a practical way, and I know of nothing more important than the amendment or enactment of such laws as to the bar and litigants in general may bring much needed relief. I spent upwards of a week at the Legislature in procuring an amendment to our statute permitting depositions to be taken upon oral interrogatories, and it was all I could do, owing to the fact that the bill had been neg-

lected, to get the bill passed. A committee, such as I have suggested, could receive new bills and amendments from lawyers all over the state, could prepare them, or see that they were prepared, and by giving the matter attention early in the session, could, undoubtedly, procure the passage of such bills as would meet the different changes suggested by the bar. When left to the individual members of the judiciary or other committees of the House and Senate, my experience has been that the bills do not receive the proper attention, and in the anxiety to have some pet measure passed, much legislation which would bring relief to litigants, is overlooked." And I reiterate the recommendation. We can well afford to raise our annual dues in order to secure a fund which will provide adequate compensation for or the payment of the expenses of a committee selected by this Association, whose duty it shall be to examine all laws introduced, and to make recommendations to the Legislature. I am also in favor of a code commission, because the condition of our laws respecting many subjects, which the limits of this address will forbid naming, makes one necessary; but I would first wish to see a greater safe-guard placed about this loose legislation, so that the evil of hasty legislation may be avoided.

Three years ago I directed your attention to the following, among other subjects, as deserving the attention of such a committee: Relief from judgments taken by default; clearing up the manner of service by publication; correcting the mongrel statutes respecting the vacation of judgments as contained in sections 5153 to 5162, Ballinger's Code, which compel a litigant to try a case twice in order to discover whether he had a defense the first time; the incongruities in the garnishment act wherein the affidavit upon which it issues may be made by the plaintiff or some one in his behalf, while the controverting affidavit can only be made by plaintiff; neither can amendments be made to garnishment papers, while in attachment they are supposed to be permitted almost *ad libitum*; the statute of perjuries commonly known as the attachment statute, should compel a statement of facts, not conclusions, before permitting seizure of property; failing to have pleadings in trying title to property claimed by a third party; and regulating the fees of receivers. We complain of the existence of these evils, but what do we do to correct them? Can this Association serve a bet-

ter purpose than that of directing the attention of the Legislature to such matters? These were but a few suggestions hastily made. A committee given plenty of time and some compensation could accomplish a great deal. If I succeed in impressing upon you the importance of such a committee, and it is selected, I would feel as if this Association had accomplished some good, and when soliciting our brethren to join I could "point with pride," to use a conventionalism, to a result obtained. The next two years can be well employed by such a committee.

I shall trespass upon your patience a little further in order to convince you, if possible, that there are other matters which require attention and which will be neglected if this Association fails to take the initiative. Strange as it may seem, no punishment other than contempt of court is provided in case of a juror soliciting or accepting a bribe, and as the result of which, only recently in our own city, a corrupt juror had but to step across the state line to avoid all punishment for the offense which he had committed. I am in favor also of such an amendment to our constitution as will permit the establishment of municipal courts in cities of the first class, and I would give such courts jurisdiction up to the sum of one thousand dollars, and thus relieve our superior courts of the burden of smaller litigation which causes expense and delay entirely out of proportion to the amounts and interests involved. We ought to have speedy trials of civil cases, as well as criminal, and so long as we have justices of the peace who are occupied but a very small portion of their time, we could better afford to increase their jurisdiction and thereby diminish the burden impressed upon the superior court; and if you will pardon a localism, I also believe that a satisfactory condition of affairs can never exist in Spokane county until the judges elected for this county shall confine their labors to caring for the litigation of this county alone. It usually happens that just at the time when important litigation ought to be disposed of, our suburb, known as Stevens county, makes a demand upon one of our judges, which takes him away from our own county and causes business here to be at a standstill until his return. It is unfair to the court and unprofitable to both counties and the litigants.

I also wish to go upon record as advocating a session of the Su-

preme Court in Spokane, and the establishment of a library not alone for such judges, but for the bar of eastern Washington. Western Washington has within its limits a library at Olympia, while we are without adequate resources of that kind. I am thoroughly satisfied that many a litigant has been deprived of a right of appeal to our Supreme Court because of the expense involved in a proper and personal presentation. I am also in favor of requesting our Supreme Court judges to extend the time of argument to at least one hour, especially since the acquisition of two additional judges ought to lighten the burdens of that court to a considerable extent. It is quite as important to have cases fully argued as to have them decided with reasonable promptitude.

One reason why I am somewhat insistent upon sessions of the Supreme Court in this city (Spokane) is because it might accelerate the work of that court in more ways than one. A change from Sleepy Hollow Olympia to Sprightly Spokane would, no doubt, lead to more satisfactory results. At any rate I would like to see the experiment of a climatic change tried. A sojourn in a live town and contact with hustling people might cause cases to be decided that were argued months and possibly years ago.

I am further in favor of the imposition of terms upon the denial of frivolous motions, or the overruling of frivolous demurrers. It will lighten the burdens of the taxpayers and the courts, and give to the lawyers relief from a habit that has grown upon them, to the exclusion, I believe, of a speedy and proper trial upon the merits. We must sooner or later follow the practice of the older states where, as litigation has grown, the practice of interposing dilatory motions and pleas has been discontinued in this most effective way. The busy lawyer has no time to trifle with such motions, and he who has nothing to do except to make them had needs use his time to better advantage, either in some other profession or at some other vocation.

I am further in favor of greater secrecy in trials for murder, rape, or the lesser degrees of such species of crime. We are making of the trial of such causes, especially, a spectacular play with full stage accessories, and the lawyers and witnesses and sometimes the courts now play to the galleries and endeavor to heighten theatrical effects. As a result, murderers are overwhelmed with

floral tributes, and false sympathy is created where condemnation should exist. Within the past few weeks, near Galena, Kas., the preliminary examination for a murder took place in the woods. The magistrate sitting beneath a large tree, flanked by counsel and witnesses, while two thousand spectators from the surrounding country, who had driven many miles to be present at the show, coming as they would to a circus, made up the audience. After a while I expect to see some enterprising museum magnate offer to stage a genuine murder trial, for in addition to exhibiting a convicted murderess he might as well, and with greater profit, undoubtedly, give an entire court scene.

Respecting the other crime to which I have referred, I wish to suggest that public trials in which salacious details are listened to with rapt attention by young and old, are a greater menace to public morality than many of the evils against which legislation has been directed. I have in mind a certain trial within the limits of this city when women and children came to the court room almost before the doors were opened, and then brought their lunches, so that they might not lose their seats nor miss a single disgusting detail. There is but one way to treat such an evil, and that is to close the court room to all except those who have legitimate business therein.

The requirements for admission to and expulsion from the bar are not yet sufficient.

New York state now has a permanent board of examiners, and a higher grade of scholarship and a longer course of study is exacted.

In foreign countries, to be a member of the legal profession means a thorough preparation and a long preliminary service, while with us, I fear, the reverse is the case. The foreign element, accustomed to see in the lawyer the embodiment of learning procured by years of mental toil, take it for granted that the lawyers of this country are as carefully prepared and as thoroughly equipped, but in too many instances, with sorrow and expense, they learn to the contrary. Not for such as these alone, but for the honor and glory of our profession, we should be anxious and willing to elevate its standard.

We are making some progress in the matter of expulsions. In the April 4th number of the advance sheets of the sixty-fourth Pa-

cific Reporter will be found four affirmances of disbarment proceedings in the state of Colorado alone.

Our state and local associations can do much towards aiding the work of exterminating reprobates who are a disgrace to the profession, and in disseminating more gentlemanly conduct in the presentation and trial of cases, and in the more general intercourse between the members of the bar.

I have another suggestion to make as to a practice which now obtains, and which I think could be improved upon, and that is, respecting instructions to juries. You have probably all had the same experience that I have had, where, owing to lack of time for preparation, or the sudden termination of a trial, you have been compelled to either write or hastily dictate instructions. Your opponent has been compelled to do the same. The result necessarily is that the court, anxious to expedite business, and not stopping to have them legibly written, or neatly prepared, has been forced to stumble through these instructions to the great mystification of the jurors, and sometimes he stumbles through those *he* has prepared, and for the same reasons.

Only a few days ago an honest German, while being examined as to his competency, and to whom were directed the ordinary questions, said to the examining lawyer: "I wish you would make your words more blainer," yet this juror was expected to fathom intricate problems of law, and to understand rules of evidence clothed in legal verbiage that a layman of good education would find it difficult to follow. I believe that a better and more just result would be reached if the court took the time to put the instructions in simpler language, and in the briefest possible manner would elucidate the law as applicable to the case. There are some simple matters that every jury should be instructed in at the very inception of the term, very much as the grand juries are charged, more particularly as to the instructions concerning the burden of proof, and the credence to be given witnesses. These are repeated in every case, and swell our stenographers' bills when an appeal ensues, and take up time that might be devoted to a clearer enunciation of the principles involved in the litigation.

I have seen no reason to change my views expressed two years ago on the subject of boycotts and strikes. Events occurring since

have strengthened my convictions, and reassured me that the laws against boycotts and riots are not sufficiently stringent, nor adequately enforced.

Every man should be allowed to earn his living without interference from those less willing, so long as he keeps within the law. Free labor should be the corollary of free speech.

Albany and St. Louis have recently furnished striking examples of the results of riotous and unlawful acts. National and state statutes should provide the promptest and most effective relief, and should receive support from all lawyers. It is claimed that we make the law; we can also direct public opinion into the proper channels of thought and action, and thus assist in the enforcement of such law as shall make secure life, limb and property.

Very recent events may make a subject apropos. It is one that will probably not be referred to by others, nevertheless it has been brought home to me, and possibly to some of you, with such dire results that a recurrence of the evils is to be avoided if legislation can provide the means. In nearly every instance of the failure of a national bank we find the cause in loose and illegal banking methods which a *proper* examination by a *competent* and *honest* examiner might have exposed and probably averted.

The present method of examinations by national bank examiners is a delusion and a snare. Men are appointed who are absolutely incompetent. Political debts are largely responsible for the refuge offered such appointees. I know of instances where excess loans, insufficient securities, missing securities, illegal dividends, rank nepotism, and other evils which threatened the existence of a certain bank, were constantly overlooked by successive examiners. There are other instances of banks which were closed being permitted to re-open through potent political or financial influences only to again close, and thus ensnaring innocent depositors and stockholders. In one instance in our own city but a single small dividend was paid excepting the regular monthly dividend paid for several years to the receiver—when honesty and good conscience demanded a prompt settlement of the affairs of the bank.

When, in this state especially, an examiner is inadequately paid a fixed fee for each bank he examines—putting him on a par with

the shoemaker who works by the piece—what can you expect? He fits from pillar to post, making but a superficial examination, and then only to see if the cash balances or the proper books are kept.

How frequently the directors meet, how many relatives of the officers, or how many directors of the bank are borrowing its money, or to what extent, and how secured, are matters that he thinks do not concern him—and yet when failure comes and the depositors and stockholders suffer, and he has overlooked the vital things he was charged with seeing, not a murmur is heard from Washington, and he inflicts his incompetency on another bank.

The law should be so amended as to eliminate politics and incompetency. Compensation should be so large and certain that only competent men with no uncertainty of tenure of office, except for good cause, should be sent to jurisdictions where they are familiar with men, values and surroundings.

To illustrate how little is known of the topography or geography of our state by Washington officials to whom are entrusted such important matters, I need only say that one of the most experienced examiners once informed me that he was ordered to go from Palouse City, where he was in charge of a bank, to Puyallup, to put some one in charge of a closed bank there, and to return to Palouse City on the afternoon of the same day.

This Washington (D. C.) official thus sending peremptory messages was as familiar with distances and surroundings as the New York lawyer who wrote a letter to his junior partner who was temporarily at Spokane, to leave on the morning train for Seattle and argue a motion in the Federal Court, and to return to Spokane so as to be there early in the afternoon of the same day, as his services would be required at Spokane. He wrote further that upon looking at the map he found Seattle was but one inch from Spokane.

We want greater competency in and out of Washington—less circumlocution—more dispatch in closing up the affairs of these institutions. Let competent examiners be given the powers of receivers, when banks are closed, and without additional compensation; and above all let them report the violations of the law by plastic cashiers or unscrupulous officials, and depositors and stockholders will have the protection to which they are entitled.

The Federal Courts, I believe, should be given jurisdiction of these matters rather than the Treasury Department with its multifarious divisions.

I would rather pin my faith to a fearless federal judge than to political-policy playing partisans—who can be influenced by men and money.

Right here in Spokane we have known what it is to suffer from the acts of conscienceless receivers and other officials who have had sufficient “pull” to prevent civil and criminal prosecution for offenses which ought to make honest men turn from them in disgust, no matter how great their wealth or palatial their residences. Had they been poor men who had stolen, or been faithless to a trust, imprisonment would have followed. Dishonest bank officials and receivers must be handled at short, and not at long, range, and the Federal Courts should be the fortresses.

I trust our session will be fruitful not only of pleasures, but of results.

THE TRUST FUND THEORY OF CORPORATE ASSETS.

BY JUDGE A. G. KELLAM, OF SPOKANE.

The question of the relation of the creditors of a corporation to the assets of such corporation, is one that has given judges and lawyers no little trouble.

From the beginning, corporations have been recognized as personal entities. Within the limits of their powers they are persons. They may make contracts, and sue, and be sued upon them as persons. They are answerable for their frauds and their torts as individuals are.

Having thus recognized that in dealing with property and property rights, in the matter of acquiring, holding, and selling property, in creating, and in answering to liability, corporations have all the attributes of persons, it has been a troublesome question to determine at what point, if any, and upon what consistent or logical ground, if there be such, can the ordinary relation existing between the owner and his property be denied to the corporation as the owner of property. At what point, and upon what ground can a corporation, having become the absolute owner of property, be refused the right to dispose of the same as its absolute owner?

If A owe B and C, he may appropriate all his property to the payment of his debt to B, leaving C remediless. The law fully recognizes his right as a debtor to prefer one creditor to another, and to exhaust his entire property, his entire ability to pay, in execution of such preference.

The right of a corporation debtor to thus make preference among its creditors has by some courts been denied. The denial has been placed upon the ground that the property of every corpor-

ation constitutes a trust fund for the payment of its debts, so that, if all creditors cannot be fully paid, they must share ratably.

I think it is generally understood that the earliest judicial announcement of this thought, or theory, was by Judge Story in *Wood vs. Dummer*, 3 Mason, 308.

In that case a bank divided up two-thirds of its capital among its stockholders without providing funds to pay its outstanding bill-holders. All that was required to be decided in that case was that the corporate property must be first appropriated to the payment of the debts of the corporation before it could be distributed among its stockholders, and that was probably all the learned judge intended to decide.

There is certainly a very wide difference between the doctrine that the debts of the company must be paid before its assets can be divided among its stockholders, and the doctrine that the company holds its property in trust for the equal benefit of all its creditors.

But the expressions used in that opinion have been cultivated and added to until the result is a well sounding and seductive doctrine, known as the trust fund theory, which declares that the entire property and assets of a corporation constitute a trust fund in which all creditors are entitled to share ratably, so that a corporation, unable to pay all its debts, may not prefer one creditor to the prejudice of another.

Our own Supreme Court has, in several cases, notably *Conover vs. Hull*, 10 Washington, declared its adherence to the trust fund theory, claiming to be supported by the "large majority of adjudicated cases." My own reading has led me to a different conclusion, and the purpose of this paper will be to exhibit the disposition of the courts generally toward the theory under consideration.

The question, of course, is not what the legislature might do in fixing the powers, or in regulating the conduct, of corporations organized under its authority, but can the courts in the exercise of judicial authority only consistently say that an individual or a partnership may rightfully prefer one creditor to another, but that a corporation cannot. Is it for the courts to say that a corporation, by becoming insolvent, *ipso facto*, loses its dominion over its property—its right of disposition of it. A corporation becomes

insolvent just when the partnership or the individual becomes so—when it is unable to pay its debts from its own means, as they become due. The theory under discussion says that the property of a corporation is a trust fund for the payment of its debts; but this is also true of a partnership, and really of an individual, and for the same reason.

Pomeroy says this doctrine of trust is just as applicable to a partnership and its assets, as to a corporation and its assets, and that in either case the relation can only be so named by way of "analogy or metaphor." He further says: "It is plain that no constructive trust can arise in favor of the creditors unless the partners or directors, through fraud or a breach of fiduciary duty, wrongfully appropriate the property and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordinary legal means." 2 Pomeroy's Eq. Jur., sec. 1046. It is not easy to see why in the case of a corporation or a partnership the mere fact of insolvency, without more, should of itself change the character of what was the absolute property of the corporation or partnership into trust funds. Insolvency creates a condition which justifies a court with equity powers in laying hold of assets, and *then* so treating and disposing of them. While the assets remain undisturbed in the hands of the corporation or partnership, solvent or insolvent, it owns and may dispose of them as an individual owner may, in any manner not fraudulent as to its creditors, including stockholders in case of a corporation. Nearly all commercial credit is given to the individual, the partnership or the corporation on the strength of its known assets, and in reliance upon a prudent management, and an honest appropriation of them to the payment of its debts.

In this sense the property of every debtor is a trust fund, with himself as trustee, for the payment of his debts. It is no more so simply because the debtor is a corporation, so long as it continues its active functions as such, and retains absolute control of its property. At no time does the trust attach to the property because it belongs to a corporation; but when the corporation becomes insolvent and unable to continue its active life, it is so far civilly dead that its assets become subject to the administration of the courts. From that time the assets coming into the hands of

the court are treated as a trust fund for the benefit of creditors and stockholders, for they then constitute an estate to be administered.

In *Graham vs. R. R. Co.*, 102 U. S., 148, the learned Judge Bradley said: "When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust-fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust-funds, which, in other circumstances, are as much the absolute property of the corporation, as any man's property is his." Or, as expressed by Judge Brewer in *Hollins vs. B. C. & Iron Co.*, 150 U. S., 383: "It is rather a trust in the administration of the assets *after possession* by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

This trust doctrine, as applied to the assets of corporations, solvent and insolvent, was fully discussed by Judge Brewer in the case last cited. The doctrine of the opinion is thus stated in the headnote:

"The expression often used, that the property of a corporation constitutes a 'trust fund' for its creditors, only means that when the corporation is insolvent, and a court of equity has possession of its assets for administration, such assets may be appropriated to the payment of its debts before any distribution to the stockholders, but as between a corporation itself and its creditors, the former does not hold its property in trust or subject to lien in favor of the creditors in any other sense than does an individual debtor."

In *Conover vs. Hull*, the Washington case already referred to, Judge Dunbar observes that neither the U. S. Supreme Court nor the New York Court of Appeals accepts the trust fund theory, but intimates that these courts are not in line with the "great majority of cases adjudicated on this subject."

The Supreme Court of Michigan, in *Town vs. Bank*, 2 Douglass, 530, held that a corporation has the same right to prefer one creditor over another that an individual has. In subsequent cases that same court has declared the same doctrine. In *Bank vs. Potts S. & L. Co.*, 90 Mich., 345, it was declared to be the established law in that state that "a corporation may, in the absence of legislative

restriction, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence its assets do not become a trust fund for *pro rata* distribution among all its creditors until steps are taken under the "winding up Act."

The Supreme Court of Minnesota, in *Hospes vs. Car Co.*, 48 Minn., 174, 50 N. W., 1117, considered the merits of this trust fund doctrine and held that, unless prohibited by statute, an insolvent corporation has the same right as an individual to prefer creditors, and that there is no solid foundation for the doctrine that the insolvency of a corporation has the effect of converting its assets into a "trust fund" in any proper sense of that term.

Judge Mitchell, speaking for the whole court, said: "The corporate property is not held in trust in any proper sense of the term. A trust implies two estates or interests, one equitable, and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust.

The capital of a corporation is its property. It has the whole beneficial interest in it as well as the legal title. It may use the income and profits of it, and sell and dispose of it as a natural person. It is a trustee for its creditors in the same sense, and to the same extent, as a natural person, but no further."

The courts of Connecticut have always declined to accept the trust fund doctrine. As early as 1826 the Supreme Court of that State, in *Catlin vs. Bank*, 6 Conn., 233, said: "The cases of an individual and of a corporation in the matter under discussion, it appears to me, are not merely analogous, but identical, and I discover no reason for the slightest difference between them. * * * * The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors."

In the subsequent case of *The Pondville Co. vs. Clark*, 25 Conn., 97, decided thirty years later, the same court declared itself entirely satisfied with its conclusions in the former case, and said, "that the insolvency of the corporation no more impaired its power to manage its concerns and deal with its property than if it had been a natural person."

In *Wilkinson vs. Bauerle*, 41 N. J. Eq., 640, 7 Atl., 514, the court said: "If there be no legislative prohibition against the transfer of corporate property, or its use in preferring creditors after insolvency, no reasons can be given why such transaction should be invalidated which would not also invalidate the like transaction of individuals. Both reason and authority establish the proposition that a corporation may sell and transfer its property, and may prefer its creditors, although it is insolvent, unless such conduct is prohibited by law."

The Supreme Court of Arkansas, in the recent case of *Worthen vs. Griffith*, 28 S. W., 286, holds the same way. In its opinion it says: "It is only when a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets of an insolvent corporation, that its assets may, in this State, be properly said to be a trust fund for its creditors."

In *Bank vs. D. B. & G. Co.*, 40 N. E., 810, the Supreme Court of Indiana discussed this question at length, and as its conclusion declared that "Until the Court, by its officers, takes charge of the property of an insolvent corporation, the corporation has the same power as an individual over its property, and may prefer certain creditors."

The same doctrine, as to when the assets of an insolvent corporation become trust funds, was declared by the Supreme Court of Missouri in *La Grange Butter-Tub Co. vs. Bank*, 26 S. W., 710. "In case of an insolvent corporation, a court of equity will make distribution of the corporation assets pro rata among the corporation creditors, and to that end will regard the corporation property as a trust fund. It is in this same sense and upon this principle that the assets are trust funds. They are trust funds when a court of equity is appealed to in behalf of any member of the corporation, or creditor, to protect and distribute the assets upon equitable principles."

The Supreme Court of Alabama, in a very able and elaborate opinion, expressly repudiates the trust fund theory, and to do so overrules a number of cases in which the doctrine had been previously recognized by that court. The court said: "There is nothing clearer in principle than the proposition that the property

of a corporation, solvent or insolvent, bears identically the same relations to the creditors of such corporation as the property of an individual or co-partnership, solvent or insolvent, sustains to the creditors of the individual or partnership, and is or is not to be impressed with a trust character upon the same circumstances and under the same conditions in the first case as in the latter two." *Jewelry Co. vs. Volfer*, 17 Southern, 525.

In the recent case of *T. H. Electric Light Co. vs. H. E. & G. Co.*, 21 S. E., 951, the North Carolina Supreme Court deliberately rejected the trust fund theory and declared generally that the relation between the corporation creditor and the corporation, whether solvent and insolvent, is simply that of creditor and debtor, and that the creditor has no equitable claim upon the corporation assets, either because it was a corporation, or because it was insolvent.

The Supreme Court of Maryland thus expresses itself upon this question: "No satisfactory reason has been advanced, and none is perceived why a corporation in failing circumstances, unless restrained by some express provision of the charter of incorporation * * * may not assign its property to trustees, for the benefit, either of preferred creditors, or of all its creditors equally, as well as an individual in insolvent circumstances: the same relation of debtor and creditor subsisting in one case as in the other." *State vs. Bank*, 26 Am. Dec., 561.

In *Iowa, Buell vs. Buckingham*, 16 Iowa, 284, seems to have been the pioneer case upon this subject, Judge Dillon holding that if it should be thought desirable to fix a different relation between the creditors of a corporation and the property of a corporation than ordinarily exists between a creditor and the property of his debtor, it should be left to the legislature to do it, and in a number of later cases in that state the Supreme Court has asserted the right of an insolvent corporation to make preference among its creditors. In *Garrett v. Burlington Plow Co.*, 70 Iowa, 697, the court said: A creditor may accept payment or security from an insolvent debtor free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do."

In the recent case of *Ames & Frost Co. v. Heslet*, 47 Pac., 805, the Montana Supreme Court put itself upon record as follows:

"The trust fund doctrine * * * impresses us as unsubstantial theory, constructed of judicial expressions selected without regard to their context or the facts in reference to which they were uttered. * * * All this reasoning against upholding preferences in assignments by insolvent corporations should be addressed to legislatures rather than the courts."

The Supreme Court of Nebraska, in *Shaw v. R. & S. Co.*, 69 N. W. 947, distinctly declines to accept the trust fund theory.

The Supreme Court of Utah discusses this subject elaborately and vigorously in *Wyeth Hardware Co. v. J. S. B. Co.*, 47 Pac., 604. It expressly repudiates the trust fund doctrine. Of the Washington cases holding to it, that court says: "They are so manifestly against the weight of authority that we must decline to follow them."

The Supreme Court of Colorado, in *Farwell Company v. Sweetzer*, 51 Pac., 1014, after quite a thorough discussion of the question, says: "Notwithstanding the confident language in which the extreme trust fund proposition is asserted, the reasoning by which it is sought to be supported does not commend itself to us as sound."

In California I have not run across any case distinctly discussing this question, but in *Welch v. Sargent*, 59 Pac., 319, the court expressly accorded to an insolvent corporation the right to make preference among its creditors the same as a natural person.

The Supreme Court of Wyoming, in *Conway vs. Smith Mercantile Co.*, 46 Pac., 1084, thus disposes of the question in that jurisdiction. It says: "It is urged that the assets of a corporation in failing circumstances constitute a trust fund for the benefit of all creditors alike, and that no arrangement, resulting in any preference of a part of the creditors over others, will be allowed to stand. Judge Thompson takes this view in his *Commentaries on the Law of Corporations*. The great weight of authority is against him."

But the growing length of this paper forbids further extracts from judicial opinions.

I think it is true, however, that the courts of not more than six or seven of the American states are now accepting this judicial invention known as the trust fund theory. I believe that, as a rule, both bench and bar regard its adoption by the courts as an unauthorized assumption of legislative functions.

Among the half dozen states which are regarded as trust fund theory states, is Tennessee, and yet in *Buchanan vs. Barnes*, 34 S. W., 425, the Supreme Court of that state held that the assets of a corporation which was insolvent in fact did not constitute a trust fund for its creditors so long as the corporation continued a "going concern." In that case it was held that a creditor who had secured a judgment against the corporation two days before the filing of a bill for the winding up of its affairs as an insolvent corporation, was entitled to priority of payment over other creditors.

The logic of this distinction is not easily apparent. If the assets are a trust fund for creditors then each creditor is entitled to his share of it, and no creditor ought to be allowed by any means to get the share that equitably belongs to another. To validate such a proceeding would seem to undermine the very principle upon which the trust fund theory is supposed to rest.

The Supreme Court of Washington takes what seems to me more consistent ground, and holds in *Compton vs. Schwabacher*, 15 Wash., 306, that a creditor can no more secure a preference in the distribution of the trust fund by the compulsion of legal proceedings than he can by the voluntary act of the corporation.

I have read with interest what Mr. Thompson says in his great work on corporations. He is an author of acknowledged learning and ability, and an earnest champion of the trust fund theory. Upon all matters he expresses his personal views positively and clearly, and usually dispassionately; but his treatment of this question—his characterization of the deliberately declared opinions of eminent courts and judges as "the mouthings of judges" with "low conceptions," "destitute of the sense of justice," and other similar expressions, evince such a degree of morbidity upon this subject as greatly to compromise the value of his opinion. He says (Sec. 6496) the "fallacy" of the conclusion to which these thoughtless judges have "jumped" is in overlooking "the fact that the analogy between an individual and an insolvent corporation wholly fails in this: that although an insolvent individual may turn over his property to certain of his creditors, whom he desires to prefer, and may by so doing hinder and delay the others, he does not by that act destroy himself; he still lives, and he may, and often does, get on his feet again, and acquire property

and discharge his previous obligations. But when a corporation becomes insolvent and ceases to have the means of carrying out the object of its creation, and dispossesses itself of all its property it destroys itself and becomes *ipso facto* dissolved." In his zeal to demonstrate the "fallacy," has not the learned author allowed himself to start from unstable premises?

Is it entirely safe to build upon the foundation that when a corporation becomes insolvent, "and dispossesses itself of all its property, it destroys itself and becomes *ipso facto* dissolved?" In section 6483 of the same book, he tells us that "the assignment by a corporation of all its property for the benefit of its creditors, does not extinguish it as a corporation, or disable it from maintaining an action unless the subject matter of the action passed from it by the assignment." In this latter statement he seems well supported by authority, though Judge Story, in a dissenting opinion in *Beaston vs. Bank*, 12 Peters, 138, intimated a contrary opinion.

The law is generally recognized to be as stated by Mr. Thompson, that neither the insolvency of, nor a general assignment by, a private corporation, works its dissolution.

It is true that an individual debtor, stripped of his means for satisfying his debts "still lives," but it is just as true of a corporation. Each is still a living debtor without present ability to pay his or its debts. It is probably true that an individual debtor is more likely to "get on his feet again," but that is incidental merely and does not prove nor tend to prove any difference in their legal status. A young man having become insolvent and unable to pay his debts is more likely to get upon his feet again than an old man, but it would hardly be expected that the courts would say on that account that the one held his property and the right to dispose of it by a different tenure than the other. The possession of property is no more essential to the existence of a corporation than it is to the existence of a man. If a corporation becomes insolvent there is nothing to prevent its members, until its dissolution is legally declared, from furnishing more funds and proceeding to use its corporate powers, and as we all know, this is often done.

But it will doubtless be suggested, if the trust fund theory is rejected, ought an insolvent corporation to be allowed to first pay

or secure its own officers to the prejudice of the other or outside creditors of the corporation? This is a question that cannot be disposed of in detail in the few lines that I feel at liberty to add to this already tedious paper.

Viewed as a question for the courts only, but still recognizing the right of the legislature to prescribe the powers of a corporation created under, or by, its authority, I think, in the absence of such legislation, the courts, no more than the executive department of the State or county, can rightfully discriminate between different classes of property owners, and say by virtue of their authority to *declare* but not to *make* the law, that the owner of the property, if a natural person, may dispose of it in the payment of his honest debts as he may choose, but if a corporation it cannot.

Upon principle I am inclined to think that in each case the question should be tested by the same rules of honest and fair dealing, and that it is not the rightful exercise of judicial authority to set aside such transfer simply because made by a corporation to one of its friends or trustees, when under the same conditions of fairness and absence of fraud it would be upheld if made by a natural person.

It is probable, however, that my own conviction as to what the law should be declared to be upon this question is not sustained by the weight of adjudicated cases, and I close with the statement of Mr. Rich, the editor of *Lawyers' Reports Annotated*, whose intelligence and facilities for investigation entitle his conclusion to great respect. He says:

“On examination of the decisions, it is clear that the weight of authority is overwhelmingly in favor of the legality of preferences to ordinary creditors, except as restricted by statute, and overwhelmingly against the validity of such preferences when made in favor of directors.”

PRACTICAL ADVANTAGES OF THE TORRENS SYSTEM.

BY T. O. ABBOTT, OF TACOMA.

Your committee has assigned to me a discussion of the "Practical Advantages of the Torrens System of Conveyancing." The subject almost precludes discussion, for to know what the system is, is to know what its advantages are.

I must admit at the outset, that I am a partisan of some improved method of transfer of land titles, whether it be the Torrens or some other system. The cumbersomeness, the expensiveness, the uncertainty, and the insecurity of our present system approaches near to the barbarous. Indeed, transfer by deed is traceable to the ancient method of the barbarians. First, there was the actual transfer by seizure and delivery; then the symbolic transfer—the "clod of earth;" then the constructive transfer—the title deed; to which, for the purpose of notice, has since been added, registration.

Of all the systems so far devised for the passing of land titles, the "Torrens System" is undoubtedly the best. Not that it is faultless, or that it cannot be improved, but that it possesses the essential elements necessary to a practical system is not doubted.

It is not, as is generally supposed, a system of registration only, but it is a system of transfer of title. In fact, this is the distinguishing feature between it and the present system—the one being transfer by registration, and the other transfer by deed. By the present system, execution and delivery of the deed accomplishes the transfer; while by the Torrens System, it is accomplished only by registration. The contract remains the same, and is as enforceable under the new system as under the old; but, like a transfer

of shares in a corporation, it is not complete until "entered on the books."

In a discussion of the practical advantages of the new system, it is impossible to put aside the particular field of its operation. In all new countries, transfers of real property must of necessity be more numerous than in old and well settled communities. Washington is a new state. It has great natural wealth, which is in need of development. It has forests and fields and mines, all awaiting the influx of men and money. For many years to come, there will be great activity in transfer of land, and whatever will conduce to economy, security and expedition in this respect, will contribute to the prosperity of the people. Such conditions do not obtain in the older states of the Union. Titles there do not readily change their status, or their ownership; they are passed from one generation to another without alteration. A transfer of land is the exception and not the rule. But here, all titles are new. The title that does not frequently change ownership, is the exception, and not the rule.

In all modern civilized American communities, we have three distinct periods, or classes, of land-holding and land-holders:

First. The period of the pioneer and the prospector, blazing the paths, and marking the spots where the riches lie. To him it is of little moment what the particular steps of his title may be; he is concerned only in its source; possession is his law, and there is no one to dispute that with him.

Second. The period of the speculator and the adventurer—the period of temporary acquisition. It is in this period that title usually becomes complicated, and that the defects begin to creep in. It begins to assume the character of the men who acquire it—momentary, fleeting, questionable. The speculator cares but little what his title is, so long as it is sufficient to serve his temporary purpose. There are conveyances and agreements to convey; mortgages that do not mortgage, and releases that do not release; suits and judgments; liens and claims; taxes and assessments; guardians and wards; proceedings in probate; deaths testate and failure to probate; deaths intestate and failure to administer; sales without authority, and without jurisdiction; distributions that do not distribute—all swept on by a flood of in-

competency and carelessness, until the title is completely overwhelmed in error. Then comes the

Third period. The period of the investor and developer—the season of correction. The cautious, conservative investor arrives, and he feels his way carefully, for he is building for the future. There follows the slow, painstaking search through masses of public laws for authority, and through piles of public and private records for apparent and possible blunders; the search for the missing heir; the suit to quiet title; the compromise—and finally, a doubtful opinion, concurred in by few, and disputed by many. The title is accepted, with misgivings; the purchase is made, possession is taken, and development proceeds; when lo, there arises the spectre of the action in ejectment, and the ouster soon follows.

Thus, we grope along from decade to decade, and why? All because of the influence of precedent, the multiplicity of laws, and the unwisdom of legislation. Men in the concrete are slow to learn and averse to change, especially in matters of government. They prefer to believe and accept what is, as right and inevitable. As was said of this class by an eminent statesman, they “love and revere the mysteries which they have spent so much time in learning, and cannot bear the rude hand that would sweep away the cobwebs, in spinning which they have spent their zeal and their days for perhaps half a century.”

I shall not contend that the Torrens System will obviate all of the difficulties which I have named, but that it will minimize them and largely destroy the baneful effect of those which inevitably remain, there can be no doubt. It will accomplish this in many ways.

It will place the responsibility for the origin of title in competent hands, schooled and trained to a study of the sources of title; and thus the chances of error, while of course not totally eliminated, will be greatly reduced.

It will create one source of title, and one only, and that a responsible source. There will always be an available warranty at hand.

The title it will pass will be indefeasible; thereby avoiding the many questions which now arise to disturb and defeat legitimate possession and enjoyment.

It will permit but one evidence of title to be outstanding at a given time, and thus expensive abstracts, searches and opinions will be obviated.

By reducing the expense of the transfer, it will increase the value of the property.

It will be expeditious.

It will be simple.

An examination of the statutes of the State of Washington, will show that since the organization of the territory, a brief period of fifty years, our legislators have enacted upwards of one hundred different statutes having an immediate relation to the transfer of title, and bearing directly upon the rights of the citizen to acquire property. This estimate does not take into account the many statutes relative to the use and enjoyment of the estate, but is confined exclusively to those which relate to the method of acquisition and transfer. At each successive session this list is added to, and thus, instead of title becoming simplified, as time progresses, it becomes more and more complicated, confusing and expensive to pass.

I have recently made some inquiries of several abstracting companies in the state, for the purpose of forming an estimate of the number of transfers, during the past year, calling for abstracts and examination of title. In Tacoma, alone, the number of abstracts was upwards of 8,000, and the average cost of the same was about \$6, or a total of nearly \$50,000 for abstracts. It must be remembered, however, that most of these abstracts are continuations of old ones, and that this estimate does not in any sense represent the actual cost of an abstract. One abstract contained over 500 transfers. I am assured that about two-thirds of the total number of abstracts are examined by lawyers and others, for which the average fee is about \$15, or a total, in round numbers, expended for abstracts and attorneys fees, in Tacoma alone of \$130,000 per annum.

As an indication of the number of transactions affecting title it is interesting to note that in the office of the Auditor of Pierce county, for the year ending July 1, 1901, there were filed a total of 9,495 instruments. During the same period in King county there were filed 18,981 instruments. Many of these instruments of a corrective nature were made necessary by incompetent and

careless conveyancers. Then there is the mass of business affecting title, which passes through the clerk's office, impracticable to estimate.

While all classes of persons will be indirectly benefited by the adoption of this reform, there are three classes in particular, who will receive a greater benefit than others, and a large part of the opposition to the adoption of the system comes from these classes. I refer to borrowers, lenders, and brokers.

If there is one feature of the Torrens System which presents a distinct advantage, it is that which provides for the mortgage and sale of property. It furnishes to the borrower a means of obtaining quick and ample loans; to the lender it furnishes a certain and inexpensive security; to the broker it furnishes a means of quick and certain sales.

What is the reason a man can obtain a loan on his bank stock of ninety per cent. of its face value, while twenty-five to fifty per cent. is the best that he can get on mortgage security? In my opinion, the answer is found in the uncertainty attending the title and the delays and expensiveness of foreclosure proceedings. If the title in the one case were as easily and effectively transferable as in the other, does any one believe that there would be such a vast difference in the borrowing and credit capacity of these securities? The words of the author of this system will best explain its workings in this respect:

“In mortgage and encumbrance, the old fiction of transferring the legal estate is abolished, and the object is attained by a direct instead of a circuitous procedure. The usual remedies are declared by the act to be secured to the mortgagee or encumbrancee. The mortgagor retains his certificate of title, bearing endorsement notifying the mortgagee. He can thus deceive no one, yet he retains full facilities for a second mortgage; and when all such charges are cleared, he may if he desire it, obtain a clean certificate freed from all record of the past. It is no uncommon thing for a mortgage to be completed in the space of an hour, at a cost of ten shillings to twenty shillings. No portion of the system has worked so beneficially for the community.”

The advantage to the broker is, that as soon as he has brought the parties to an understanding, his work is certain of results.

The terms of the earnest payment need not include the phrase : "Grantor to furnish abstract and perfect title." His commissions are not dependent upon the caprice of some captious title-examiner. Delays are impossible after the property has once come under the system, for there is nothing to examine, except the last transfer, and this is always evidenced by one instrument and one record, and can be examined by any person.

The one great objection urged against its adoption is its unconstitutionality, upon the ground that the duties imposed upon the registrar are of a judicial character, and beyond the power of the Legislature to confer upon a non-judicial officer, without constitutional amendment. Your committee did not invite me to discuss this feature of the system, and I do not propose to do so. The adjudications have rendered discussion of the subject somewhat unprofitable. But, aside from constitutional amendment as a solution, it has seemed to me that most of the acts so far attempted to be placed upon the statute books follow too rigidly the original Torrens plan, in all its details. Is this necessary in order to obtain the practical benefits of the system? It is seldom, indeed, that any plant will bear transplanting and produce the same fruit, in all its vigor, that it did in its native soil. But in the hands of a competent gardener the best of its nature may be preserved and adapted and the quality of its fruit may be much improved.

The Torrens system itself is not wholly the growth of Australian soil, but is an adaptation of systems in effect elsewhere for centuries. Neither is it, in its principles of simplicity, wholly the creation of the mind and hand of one man, though undoubtedly to the genius of Robert Torrens is due the adaptation and systematic arrangement of other ideas and systems ; and, for the success of of his work, he is entitled to be placed high on the roll of the creative statesmen of the nineteenth century.

The American acts usually contain a provision that the registrar, alone, shall consider the application and determine whether the property shall come under the operation of the system. Take, for example, the Illinois provision which was declared unconstitutional. It reads :

"If it shall be made to appear to the registrar that the facts stated in the application are true, and that the applicant is the

owner of the land, or interested therein, as set forth in the application, he shall issue a certificate of title, and proceed to bring the land under the operation of this act as hereinafter provided. Otherwise he shall dismiss the application without prejudice, and return the papers to the applicant."

It has seemed to me that if the registrar were made an advisory rather than a judicial officer, the constitutional objection would be eliminated. If his duties were similar to those of a referee—merely to consider and report—his act would be not more judicial in its character. In other words, if the proceedings were begun, much as an ordinary action in the superior court, with proper notice and hearing ; and at the proper stage referred to the registrar, as a referee in fact, and name, if need be, how could the constitutional objection arise? Of course, this would only apply in the origin of the title.

But, if the constitutional objection must remain, let us have constitutional amendment. A reform so beneficial in its nature, so simple in its characteristics, and so fruitful of good results, must and will inevitably force its way to adoption in a progressive community.

LAW REPORTING.

EUGENE G. KREIDER, OF OLYMPIA.

In poetic language, but with the calm, clear vision of the statesman, Tennyson has described England as

“A land of settled government,
A land of just and old renown,
Where freedom broadens slowly down,
From precedent to precedent.”

The power inherent in the Anglo-Saxon race to establish and maintain stable governments and political institutions may be either the cause or the effect of the close observance which the peoples of that race display in following precedent. It would be interesting to study whether it was the character of the race which resulted in their adhering so closely to precedent, or whether it has been their observance of precedent, for such a length of time whereof the memory of man runneth not to the contrary, that has eventually so shaped the characteristics of the people as to study their mental equipoise in political, social and legal matters. Certain it is, that the expansion of the life and thought and activities of that most virile of the human races has been gradual, but no less sure; it has clung to the old ways until absolute necessity forced it into newer paths, and then always it has lighted its feet by the lamp of past experience. Nowhere is this trait more apparent than in the doctrine of judicial precedent, and from the year 1292, when the system of reporting known as the Year Books was inaugurated, there has been a constant and ever increasing volume of judicial decisions preserved for the guidance of the bench and bar. Even before that day, there was some attempt to record the transactions of the courts in the old chronicles, but we are advised by Lord Coke to “beware of chronicle law.” Bracton, who

wrote his treatise on the law half a century before the first Year Books, cited 494 cases. So we see that the value of judicial precedents as an exposition of the law must have been very early recognized. Their binding force as authority upon inferior tribunals and upon later courts of the same jurisdiction we find adjudged as an established principle of law as early as 1304, in Year Book 32 Edw. 1, where it is said, "But consider whether he shall be received to aver these three causes; for the judgment to be by you now given will be hereafter an authority in every *quaere admisit* in England."

Twenty years ago the English reports were computed at 2,944, and it would be hard to tell the number that have been issued up to the present day in England and her dependencies, for, after the British drum beat, following the sun around the globe, has waked to strife and litigation the citizens of her numerous colonial possessions, many are the courts that begin their sessions in British North America, Australia, New Zealand, India, Cape of Good Hope, Ceylon, Mauritius, and elsewhere, as well as in England, Ireland and Scotland, and every one of them is piling up volumes of reported decisions, making a total that must certainly approximate 4,000. The American courts have had their decisions reported, even the oldest of them, for a period less than 150 years, and yet they have put out reports to the extent of almost 5,200 volumes, and these have been duplicated by various series to the number of 1,300 more, so that we have at present about 6,500 volumes of American reports, besides the numerous digests made necessary in order to ascertain their contents. In addition to the decisions of forty-five states and five territories that are being reported, we have decisions by the United States Supreme Court, United States Court of Appeals, United States Circuit and District Courts, District of Columbia, Court of Claims, Land Department and Interstate Commerce Commission. These make some sixty-five courts, each publishing its own reports, but, in addition, we have the same cases repeated, with the inclusion often of omitted cases, in the National Reporter System, the American Series, the Lawyers' Reports Annotated, and in Mining, Patent, Railroad, Corporation, Probate, Criminal, Insurance, Bankruptcy, and doubtless other series devoted to particular branches of the law. Moreover, wher-

ever the English language is read there are innumerable periodicals which make it a feature to publish more or less completely the legal decisions as they occur. It thus becomes apparent at a glance that, in all systems founded on the English Common Law, judicial precedent is a dominating force, whose value we instinctively recognize, so that the preservation of legal decisions in volumes upon volumes of reports seems to us no novelty, however strange it may appear in foreign eyes. In no country of continental Europe has precedent in legal decisions become recognized as a binding force in its jurisprudence. The distinction between the English and the Continental systems is pointed out in Holland's *Treatise on Jurisprudence* in the following language: "While in England and in the United States a reported case may be cited with almost as much confidence as an act of Parliament, on the Continent a judgment, though useful as showing the view of the law held by a qualified body of men, seems powerless to constrain another court to take the same view in a similar case." Thus, reversing our practice, the courts of continental Europe chiefly rely upon the authority of text writers, rather than that of judicial decisions; and hence our system of law reporting, with its attendant burden of immense law libraries, is to them almost unknown. The courts feel free to decide each case presented according to its peculiar facts and the legal principles applicable thereto, as the courts are able to deduce them from the expositions of learned writers upon the law or from the principles of natural justice, untrammelled by the action of other courts in seemingly analogous cases. The merits of these respective systems will not be made the subject of discussion here, though affording scope for a wide and positive variance of opinion, further than to add that in some of the countries of Europe precedents to a limited extent are beginning to be gathered up in printed volumes, while in England and America the lawyers are beginning to complain "of the making of many books," and England stands aghast at the mass of reported decisions the American courts are putting forth. Both there and here lawyers are beginning to ask what remedy there is. It is idle to say that this multitude of reported cases should be swept away and replaced by some form of codification or abridgement confining us to statements of abstract legal principles, because

that would not put an end to the present conditions, but would afford endless occasion for the interpretation of this new code. And yet the tendency is towards codification of the case law in particular branches, as, for instance, the Negotiable Instruments Act, that has been passed in some of the states. It was the notion of Bentham that the reports should be codified and all that was good and material preserved in this form, and the prior reports superseded and laid aside as of no more use than an old almanac. Although a seemingly impossible thing, and one fraught with great labor, if attempted to be deliberately carried out, his idea is being almost unconsciously carried into effect. The great mass of the older reports are scarce looked at in this day. Most of the questions vital to the law have been covered by the adjudications of the last twenty years, and all that is best in the old is almost certain to be found preserved in these later decisions. By means of an up-to-date digest, a lawyer can very likely find a late case bearing on his particular question, and this will be pretty sure to put him on the track of the more recent decisions in point, thus enabling him to ignore everything except the most modern of the reports. The time has come when the ambitious lawyer can no longer afford to gratify his wish to have a library made up of complete sets of all the reports, as was the aim of many a practitioner a generation ago. Besides being no longer necessary, a commendable substitute may be found for the older reports in the compilations in this country in 160 volumes, known as the American Decisions and American Reports, and in England a work of twenty-five volumes on a different principle, known as "English Ruling Cases," which gathers together the leading cases under appropriate heads, and by means of English and American notes, presents in condensed form, all that is most valuable in the case law of both countries. Moreover, bulky as the reported law is getting to be, the needs of the investigator into its contents seem to be supplied as fast as developed. The system of digesting this vast store house is constantly improving, gummed annotation tables have been devised, and now one of the latest publications is that known as "Notes on United States Reports," which shows wherever a decision in those reports has been elsewhere cited upon any

point. And so we may be sure that new features will constantly develop, in response to the needs of the profession, to enable them to explore

"That codeless myriad of precedent,
That wilderness of single instances,"

as our great field of law is aptly described by Tennyson.

With some fifty courts of last resort in this country, to say nothing of those throughout the British Empire, proclaiming the unwritten law as so many different minds interpret it, uncertainty and confusion are sure to exist to some extent. And yet, I believe on the whole, the result will prove beneficial in the end. The science of English law has been extracted from what might be called the various experiments of litigated cases, and our system has been built up by a sort of inductive process therefrom. With a number of courts under different surroundings endeavoring to apply legal principles to similar states of fact, we will the sooner have the true doctrine of the law announced by some of them, and, when once announced, its force readily appeals to all, and it ultimately survives as the most fit. Edmund Burke says, "English jurisprudence has not any other sure foundation, nor, consequently, the lives and properties of the subject any sure hold but in the maxims, rules, principles and judicial traditional line of decisions contained in the * * * reports."

Of the value of the reported decisions there can be no question, but in view of their multiplicity, and of the rapidity with which the quantity is being augmented yearly, the query naturally arises whether some relief may not be afforded an overworked profession, either in limiting the out-put, or, at least, in improving the character of the reports. The American Bar Association has had the matter under investigation by various committees, but has seemingly attained no definite results, other than stimulating thought and discussion on the subject. Mindful of the unsatisfactory state of law reporting in England prior to the adoption of the present form of official reports there, an attempt was made to stem the tide of unofficial reporting in this country, without other result, however, than a reformation in that respect so far as the inferior courts of the State of New York are concerned. The field occupied in this country by the National Reporter system is unique,

does not interfere with local official reports, and is not open to the objections which arose in England against unofficial reporting, where it was common for five or six reporters to cover the same ground. In seeking for remedies against the ever widening current of reported decisions, the American Bar Association seems to have reached the conclusion that shorter opinions should be written by the judges, and that long quotations from statutes, text books, and other opinions, should be discouraged, inasmuch as such authorities are readily accessible upon mere citation to the printed books; and the practice of some judges in writing treatises upon the legal questions involved in the case was deprecated. But such labor of the judges in analyzing and distinguishing the various cases supposed to bear upon the particular question in issue must surely be of the greatest aid to the profession. It seemed, also, to be the impression of some engaged in discussing the multiplicity of reported cases that all opinions which passed off upon a question of fact, or which were mere repetitions of well established principles, should be omitted from the reports. But it was finally concluded best to print all the decisions, as the bar seemed to demand it, since neither the reporter nor the court could well determine the future importance of any particular case. The official reports of New Jersey omitted 667 cases that were included within the first thirty-three volumes of the *Atlantic Reporter*, but so valuable did many of these omitted cases prove to the bar, that an index of them was printed to supply the lawyers in that state who took only the official reports. While it may be that the expurgated reports, as we might call them, would be desirable for the use of the profession at large, yet, locally, the bar seems desirous of everything that has a tendency to show the leanings of its own supreme court upon any issues that may arise. I have in mind a case in our own reports, where the court had merely affirmed the action of the lower court in sustaining a demurrer for want of facts to a complaint in an action which proved to be of general interest throughout the state. The case had really been disposed of by settlement between the parties, and could in no sense be regarded as a precedent, but, in ignorance of the actual situation, attorneys from all over the state sought the facts in the case as authority to guide them in like cases. While it seems a necessity

for the reports of each state to include all the decided matters passed upon by its own supreme court, the two series known as the American State Reports and the Lawyers' Reports Annotated are to be commended for working on the right principle, so far as the needs of the profession at large are concerned. They aim to select only the most important cases for publication, and annotate them more or less fully. Their only fault is that they fix upon a certain arbitrary number of volumes to be issued each year, although in some years the desirable cases might be furnished in half the number.

The adjudged cases being such a valuable element of our law, owing to their force as judicial precedents, it is surely of great importance that the manner of reporting them be such as to make them most readily available. If I should sound a personal note, in telling how law reporting should be done, it is with no other view than that of stimulating discussion intended for the betterment of existing conditions. The principal object of this Association is to improve the laws and their administration, and my purpose in bringing this subject before you is to learn wherein there is room for improvement, and how it should be attained. An examination of the reports of the different states will disclose such a diversity in their general style as to rouse a suspicion that there must be a standard to which all do not attain. None of the reports are complete in all details, and yet each set has its meritorious features. It seems to me those of New York come nearer perfection than most of the other states, and that, on the whole, the western states are superior to those of the older ones. I do not refer now to the quality of the editorial work, as that of course varies with the individual, according as he is more or less qualified. The newer states seem to adopt without hesitation any suggested improvement, but the older states are slow to alter their established styles, and consent only when the suggested change has come to be recognized as an imperative necessity. One of the important things to be kept in view is that the reports should be made up in such a manner as to enable their being consulted with the least possible waste of time. For that reason it has come to be the almost universal plan to have the open page disclose the number of the volume so that the reader will not be compelled to

turn the volume over to discover that fact every time he wishes to cite an opinion. The running titles at the top of the page should also indicate the title of the case, the date of the decision, whether it is the opinion of the court, or a concurring or dissenting opinion, and by what judge rendered. The running title should likewise make the distinction as to whether the printed page below is made up of a statement of the case, argument of counsel, or the opinion. You are all familiar with the difficulty, when glancing at a page of the earlier United States Reports, in knowing whether it is statement of facts, argument, or one of the three classes of opinions referred to. There is nothing to indicate, and you are compelled to glance back a number of pages, scanning them from top to bottom in order to get your bearings. The page may not look so well with all this matter set out at the top, but utility is the first consideration. There is a tendency of late, since the introduction of machine work in composition, to abridge these essentials, but I think it the duty of reporters to check the publishers in that respect. The labels on the back of the volumes should indicate the years included therein, and where many volumes a year are issued, as in New York, it is well, also, to indicate the months. This proves a great convenience whenever it is desirable to refer to the official reports for a case that has been published in the advance sheets of unofficial reports.

The style of the syllabus or head note covers a wide range, from an ample statement of facts to a bare proposition of law, neither of which extremes is very satisfactory. Every lawyer is presumed to know abstract legal doctrines; what he wants is an application of those doctrines to particular facts, and, from the multitude of authorities which can generally be found upon any proposition, it is necessary for him to select as speedily as possible those cases whose facts are most analogous to his own. If the syllabus states nothing but the abstract doctrine, he is compelled to read the case to discover how closely it bears upon his proposed argument. My own conception of the form of the syllabus is that it should be made up of what might be called mingled law and fact, showing the relation between the law and the facts, so as to enable the one consulting it to learn quickly whether he need go further into the opinion. In other words, it should state the law of that case, and

thus reflect in the syllabus the same individuality established for the case by the opinion. The aim, of course, is to carry condensation to the extreme limits, without omitting essential details. But this is not always easily accomplished. It is impossible to frame syllabi for all opinions according to one standard. For instance, in cases passing upon the sufficiency of pleadings or of evidence, it seems better to show the holding of the court by as condensed a head note as possible, which, while not completely covering all the facts upon which the court bases its decision, yet goes far enough to put one on inquiry as to the full nature of the opinion. A perfect head note would, of course, require a restatement of all the facts deemed essential by the court, but less than this ought to be adequate, for, if one is compelled to read the whole opinion in the head note, he might as well be referred to the opinion itself, where he could find the same matter in larger type. In such a case, wherever possible to extract a legal principle from the case, it ought to be sufficient to preface the opinion with it, making whatever reference to the peculiarity of the facts the reporter may deem fit. An easy method of preparing a syllabus is to give a string of facts and wind up with a "Held" showing the holding of the court on that state of facts. In some cases it is the best form that can be followed, but, on the whole, it is not a satisfactory one. It encourages prolixity in the reporter, and should be avoided wherever possible, as the rush and hurry of the age require head notes in tabloid form, if I may borrow an epithet applied to the new style of London journalism. The dictum of the court should appear very rarely in the syllabus, and then only when it bears upon a matter important to the bar, as indicating what the court would probably hold in matters involving questions of practice, and doctrines upon which there is a conflict of authority. This inclusion of dicta in the syllabi should be confined to such reports as are intended primarily for local use, such as the state reports, while those designed to reach the profession at large, such as the L. R. A. and American series of reports should carefully avoid giving the opinion as authority on any other than the points expressly determined. Under this rule will fall likewise all legal propositions contained in the opinion, which, though perfectly sound in themselves as enunciations of law, are mere

links in the judge's chain of reasoning by which the ultimate proposition is evolved.

Whenever the decision is based upon statutes, that fact should be disclosed in the syllabus, so that the first glance may show why the case seems to impose limitations on the general doctrines of the law; and cases overruled or distinguished should be shown in connection with the point with which they conflict. Each paragraph of the syllabus should also have catchwords indicating the subject-matter included therein. It was long the practice of the old reporters to give no catchwords at all, a plan still followed in some of the states. There is another body of reporters that group all the catchwords at the head of the syllabus, in order to show at a glance all the matters included, and was the practice followed in this state through the first twenty volumes of our reports. But the paragraphs of the syllabus frequently change the subject as quickly as a dictionary, and cover a wide range involving questions of pleading, practice, evidence, and substantive rights, with all their divisions and sub-heads, and it seems preferable to so designate the paragraphs that the busy lawyer may know, before reading one, whether it touches the point he is looking for. In one respect, the latter method is not so convenient as the former, since under the present arrangement the paragraphs are grouped together irrespective of the order of discussion in the opinion, so that a repetition of catchwords may be avoided, while under the old arrangement the paragraphs of the syllabus followed in the order of the discussion pursued in the opinion. This difficulty could be met, however, by numbering the paragraphs of the syllabus and placing corresponding numbers in indentations on the following pages, showing where the particular point is discussed. The judges in some states are required by law to write the syllabi, but it is safe to say that such a provision in this state would be unconstitutional. In Indiana such duties have been held as extra-judicial, and hence not compulsory on members of the supreme court. In all cases where the syllabi are written by the reporter, instead of by the judges, they should be looked over and corrected by the court, for it is a rare reporter that is capable of always giving the exact point decided.

I have sometimes been asked why I did not insert fuller state-

ments of facts in the Washington Reports. In answer, I would say that the court aims in most cases to give all the material facts upon which its decision is based, and a statement by the reporter, in attempting to inject additional matter, could not well avoid a repetition of facts already set forth by the court. I realize that the matter of a clear and adequate statement of the case is as essential to the bar as a discussion of the legal principles involved, since it is necessary to know the situation of the parties, in order to see the application. But I question whether this can be as well done by the reporter as by the judge. Prof. Wambaugh of Harvard Law School, declares his views in the following terms: "The statement now usually prepared by one of the judges as an introduction to the opinion diminishes the reporter's task very materially, enabling him now and then to omit any statement of his own, but of course the reporter is responsible for the presentation of a suitable statement, and hence the careful reporter does not assume without investigation that the judge's statement is accurate nor that it is adapted to the purposes of a report. No doubt it is seldom useful to have two statements; but if one is to be omitted, the one to be printed is one made by the reporter."

For my part, I am unable to understand on what theory the reporter's statement should be accepted in preference to that of the court. The chief object in publishing the opinion is that it may serve as a precedent, and, if its value as an authority is not to be weakened, it seems to me that the version put by the judge on the facts should control. The legal doctrines are applied to the facts which he deems material. It takes a careful and patient study of the record to pass upon disputed facts, and even then, after a court has devoted itself assiduously to determine a case in accord with law and fact, you know there is always one side to the litigation that charges the court with going wrong. If trained lawyers, after assiduous study, draw varying conclusions from the same state of facts, what sense is there in having a reporter set up his own conception of the case, when in the nature of things, he cannot give the same careful study to the record as the court does? All minds will not view the same case alike, otherwise there would be no dissenting opinions in the court itself, where all its members have had an equal opportunity to give their best thoughts to the

study of the record. In an article by Justice Miller on "The System of Trial by Jury," he makes this statement: "I must say that in my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges come to an agreement upon questions of law, and how often they disagree in regard to questions of fact, which apparently are as clear as the law."

One time, in my own experience, I went to a record for additional facts, and discovered that I could not see the facts in the same light as the judge who wrote the opinion. That experience discouraged my frequent indulgence in the making of additional statements, for it is the reporter's part to publish the law as the court makes it. My practice since has been largely confined to adding facts only when I found it necessary to go outside of the opinion itself in order to frame a suitable head note. Even admitting that the court may be in error as to what facts the proof establishes, that is a thing that vitally concerns only the actual litigants, and if the legal principles are properly applied to the facts as the court sees them, that is the thing that interests the profession at large; and it would be a mistake for any one to interpolate facts which might have a tendency to raise a question as to the decision announced. Again, the court may have intentionally ignored stating some of the incidents, for the reason that it may have regarded them as immaterial or as not having been fully established. It rests largely with the individual judge in what way he shall write his own opinions, and we must recognize that a man's best work is generally done according to his own rule, rather than according to that of someone else. There is a style, however, that is beginning to be indulged in more and more that seems to come nearer being the ideal one, and that is for the judge to make a preliminary statement of the facts in the case, prior to entering upon a discussion of the legal principles applicable thereto. No one else can be as well qualified as the judge who has of necessity thoroughly delved into the record in his study of the case, and has become conversant with what is demonstrated therein, as well as with the limitations that shade and color the bolder outlines. To ask the reporter to go into the records as thoroughly as five judges—for hasty work is not to be tolerated—is imposing on one man what

proves no easy task for the full court. Moreover, in the evolution of law reporting, it is a work that has naturally shifted from the reporter's hands. In the inception of reporting cases, judgments were delivered orally, in rather terse terms, were caught by the reporters as best they could, and were given to the public largely in the reporter's own language. The decisions, themselves would have been unintelligible had not a sketch of the pleadings and argument of counsel shown their application. Now, however, the judges write ample opinions, designed to discuss fully the law in its bearings on the case presented. The decision is not confined to a declaration of legal principles and judgment for or against a party, leaving it to some expositor to show its relation to the rights asserted or denied by the parties to the action. It is the aim of the court to make its own exposition clearly and fully, and it would be presumption on the part of the reporter, whose business is to publish what the court does, to attempt to improve on the work of the court according to his own notions.

There has been a tendency of late years towards omitting from the reports extracts from the briefs of counsel, and at the present time the majority of the reports do not contain that feature. In no case can full justice be done to the argument of counsel, because of the necessity of the utmost condensation. But there are several reasons why a summary of points and authorities should sometimes be inserted. Whenever any novel question has been discussed, the researches made by able counsel should be inserted for the purpose of forming, as it were, a stepping stone in the development of the law, and as a point gained from which to push further researches by others. Often the opinion fails to give authorities in its support, and, when not founded on elementary principles, it does not come amiss to give the argument of the prevailing party. But probably the propositions and authorities of the losing party are of more service to the profession than those of the other, since it can thus be made apparent what questions were before the court, and whether fully argued and presented, before it reached its conclusions. The opinion generally presents the theories, arguments, and authorities of the prevailing party, and it is often only by means of giving the losing party's brief, that his theory of the case can be placed before the public, and this,

without giving it the sanction of having been established by the law or the evidence. Often by presenting the arguments, the necessity of an additional statement of facts is obviated, since the opposing contentions of counsel are thus thrown into bold relief.

While on the subject of briefs, it seems apropos to bring up the matter of citations, with the uttered hope that some day there may be uniformity attained throughout the land. A case ought never to be cited as *Railway Co. v. Jones*, or *Insurance Co.*, or *Bank*, or *Land Co.*, against some one, but the distinctive part of the corporate or company name should be given, even if necessary to give it in full. It many times becomes necessary for a lawyer to pursue the title of a case through numerous tables in text books and reports in order to ascertain whether the principles involved have been elsewhere discussed. In doing so he should not be compelled to look for his case under more than one title. I regret to notice that the National Reporter System, excellent as it is in many respects, fails in this particular, having adopted the plan of taking only the latter part of a title; and if one were to look there for the case of *Union Savings Bank & Trust Co. v. Gelbach*, he would find it under *Trust Co.* Wherever possible, a citation should designate the official report of a case. There are numerous other rules that might be given, but I will add only one more, and that is, when making a reference to a text book, which, by the way, should be abbreviated as little as possible, the edition should always be named, where more than one has been issued.

In this connection I might refer to the importance of the reports containing a full table of the cases cited in the opinions, not alone those of our own state, but of all jurisdictions, in order that it may be quickly learned whether any leading case in English or American law has been under the consideration of our own court. I notice that the reports of one of the states keep a standing table of their own overruled cases, and such a table will be introduced into later volumes of the *Washington Reports*, as it is the intention to incorporate the best features of the various reports. The value of a table of statutes cited and construed is apparent to all, and might be illustrated by an incident that happened the other day. An attorney who had appeared before the court called me to one side and asked why I did not include in the index a list of the

statutes construed. I took down a volume and showed him where he could find such a table in the preliminary pages of the book, and he remarked it was worth his trip to Olympia to learn that the reports contained that necessary information. Such a table is placed by many reporters in the index, and appears there under various heads, according to the notion of the indexer; sometimes you will find what you want under the title "Code," again under "Statutes Cited," and in one case you must look for the title, "The Code." In such indexes, constitutional references are generally given under the title of "Statutes," but will sometimes be found under the title, "Constitution. In view of the fact that the most important cities of the state will always have freeholders' charters, it has been thought best to incorporate in the table of statutes a reference to the sections of such charters which the court has been called to pass upon. Federal statutes, except those specially of local application, have, however, been omitted, on the theory that the final interpretation of their force and effect rests with the Federal courts. They could very readily be incorporated, if that should prove to be the wish of the profession.

For some years the American Bar Association has been agitating the subject of uniform indexing and digesting, and it is to be hoped that its labors are beginning to bear fruit. It has largely rested with each reporter to pursue his own methods of classification, and, as digesting is a difficult science at best, confusion must necessarily result from a failure to attempt to adhere to some established system. You all know how necessary it is to look for any desired topic of the law under every conceivable title. The subject of Bills and Notes, for instance, is apt to appear under that name, or Commercial Paper, or Negotiable Instruments, or Promissory Notes, and possibly Bills of Exchange or Notes and Bills. In order to obviate this diversity, it was suggested that some remedy might be obtained through national legislation requiring all the Federal court reports to adopt some system to which the state reporters could conform. But it remained for the enterprise of private parties, acting on the suggestions and complaints of that association, to supply a remedy, and the publishers of the Century Digest compiled for the use of their editors a comprehensive Digest Classification Scheme, showing what to include, and what to

exclude, under each title; and this they willingly furnish to all applicants, though claiming to have expended something like \$20,000 in its preparation and publication. This scheme of digesting is recommended by the American Bar Association to all state reporters as affording a general plan for them to imitate for purposes of uniformity in indexing, as it is the best scheme in existence, and the one with which the profession will naturally be the most familiar. In every jurisdiction, however, there are matters justifying slight departures from any scheme intended for universal application, made necessary by matters of local interest or practice. For instance, although the subject of tide lands is properly a sub-head of Public Lands, yet on account of its importance in this state it is entitled to the prominence of separate treatment in the index. On account of the manner in which different topics of the law are sometimes merged into one paragraph of the index, the system of cross-referencing should be very complete, and the indexer can scarce err in making such references as numerous as possible.

The present system of digesting is an evolution from the National Digest and the earlier American and General Digests, and will doubtless continue to improve as the needs of the profession suggest or demand. If the reporters and text writers all over the country would conform to it, it would be one step towards uniformity in the expression of our law, while through the legislative bodies of the various states the protest against diversity in our substantive law is making progress in the enactment of uniform statutes, such as the Negotiable Instruments Act, which will some day be followed by a uniform Divorce Act, and others on different subjects of the law. The demand of the times is for greater uniformity in our laws and in the books which publish them, and though the reform may come slowly, yet it will surely come.

THE INSULAR QUESTIONS AND THEIR SOLUTION BY
THE SUPREME COURT OF THE UNITED STATES.
DOES THE CONSTITUTION FOLLOW
THE FLAG ?

BY JOSEPH SHIPPEN, OF SEATTLE.

The recent acquisition by the United States of large, productive and populous islands ceded to us by Spain as a result of our successful war for the liberation of Cuba, has given inevitable rise to many difficult, important and far-reaching questions affecting the rights and liberties of these new possessions, the reciprocal relations they bear to our national government, and the powers our government can exercise over them. In such a juncture, the natural sequence has been followed. First, the military authority had to meet *instantly* the exigencies as they arose; next, the Executive Department had to devise and enforce some regulations for order and protection; soon the law-making power of Congress was brought into requisition, and ultimately the determination of controversies, and settlement of principles were referred in cases involving public and private right, under the accepted admirable system of our free constitutional government, to the arbitrament of the Supreme Court of the United States. All these governmental powers have been invoked and exercised, and partial judicial solutions of the pressing questions have already been attained.

The purpose of this address is to present a statement of the Insular Tariff Cases decided by the United States Supreme Court on the 27th day of last May, giving questions involved, how they arose, the antagonistic contentions, and an analysis of the decis-

ions as far as rendered, with reference also to the dissenting opinions given. The wide range of argument of most able advocates, the divergent views of the justices comprising the Court, and the confusion in the public mind as to the results and present status, demand first a brief presentation of uncontrovertible principles and facts upon which all arguments and conclusions have sought consistency, if not predication. "A frequent recurrence to fundamental principles is essential to the security of individual right, and the perpetuity of free government."

THE DECLARATION OF INDEPENDENCE

After statement of grievances, declared the purpose of the United States "To have *an equal station* among the powers of the earth;" and "To do *all Acts and Things* which Independent States may of right do."

THE UNITED STATES CONSTITUTION

Declared by preamble:

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

And among other things it provided :

"The President shall have power by and with the advice and consent of the Senate *to make treaties*, provided two-thirds of the Senators present concur."

"The Congress shall have power:"

"To lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be *uniform throughout the United States*."

"To regulate commerce *with foreign nations* and among the several States, and with the Indian tribes."

"To dispose of and make all needful rules and regulations respecting the *territory or other property* belonging to the United States."

"No tax shall be laid on any articles exported from any State."

"No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another."

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, *or any place subject to their jurisdiction.*"

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all *treaties* which shall be made under the authority of the United States shall be *the supreme law of the land.*"

TERRITORIAL ACQUISITIONS

have been made by the United States as follows:

The Northwest Territory from divers states.

1790—The District of Columbia from Maryland and Virginia. Tennessee from North Carolina.

Alabama and Mississippi from Georgia.

1803—Louisiana from France. Jefferson, president.

1819—Florida from Spain. Monroe, president.

1845—Texas by annexation. Polk, president.

1848—California, etc., from Mexico. Polk, president.

1867—Alaska from Russia. Johnson, president.

1898—Hawaii, by mutual agreement. McKinley, president.

1899—Porto Rico and the Philippine Islands. McKinley, president.

SOME OF THE LEADING DECISIONS

of the United States Supreme Court relative to territories may well be named from among the scores of citations in arguments and opinions:

Loughborough v. Blake (1820), Marshall, C. J., 5 Wh., 317.

American Insurance Co. v. Canter (1828), Marshall, C. J., 1 Pet., 511.

Fleming v. Page (1850), Taney, C. J., 9 How., 603.

Cross v. Harrison (1853), Taney, C. J., 16 How., 164.

Dred Scott v. Sandford (1856), Taney, C. J., 19 How., 393.

The Mormon Church Case (1889), Bradley, J., 136 U. S., 42.

RECENT EVENTS AND DATES.

July 24, 1897, the Dingley Tariff Act.

April 21, 1898, war with Spain declared by Congress.

May 1, 1898, naval victory at Manila.

July 1-3, 1898, victories at Santiago de Cuba.

July, 1898, military occupation of Porto Rico.

August 12, 1898, Protocol for peace with Spain.

October 18, 1898, Spanish evacuation of Porto Rico.

December 10, 1898, signing of treaty of peace at Paris by Spanish commissioners and United States Commissioners Day, Davis, Frye, Gray and Reid.

February 6, 1899, ratification of treaty by Senate.

April 11, 1899, ratifications exchanged and President's proclamation of peace.

April 12, 1899, Porto Rico Act (known as Foraker Act) approved.

May 1, 1899, Foraker Act took effect.

TREATIES WITH SPAIN.

The *protocol* (August 12, 1898), provided: "Spain will cede to the United States the island of Porto Rico and the other islands now under Spanish sovereignty in the West Indies."

"Spain will immediately evacuate Porto Rico," etc.

"The United States will occupy and hold the city, bay and harbor of Manila pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines."

"Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended."

The *Treaty of Paris* (proclaimed May 11, 1900) provided: "Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies."

"Spain cedes to the United States the archipelago known as the Philippine Islands."

"The United States will for the term of ten years * * * admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States."

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States *shall be determined by Congress.*"

ACTS OF CONGRESS.

The Dingley Tariff Act, approved July 24, 1897, provided: "There shall be levied, collected and paid upon all articles imported from *foreign countries*" certain duties therein specified, including sugars, fruits, tobacco, etc.

The Porto Rico Act (known as the Foraker Act), entitled, "An Act temporarily to provide revenues and civil government for Porto Rico," approved April 12, 1900, taking effect May 1, 1900, provided:

That duties imposed by the existing Dingley Tariff Act should be collected on all articles imported into Porto Rico from ports other than those of the United States, with a few exceptions.

Further, that all merchandise coming into the United States from Porto Rico, and coming into Porto Rico from the United States, should pay for the benefit of Porto Rico, *fifteen per cent. of the duties imposed by the Dingley Act* on merchandise imported from foreign countries, together with internal revenue taxes. This fifteen per cent. duty was made temporary by providing that it should cease March 1, 1902, or sooner, if Porto Rico established its own local taxation sufficient to meet its local needs.

Previous to this enactment it was ascertained that the island of Porto Rico, having about 3,600 square miles, and 1,000,000 inhabitants, had also about \$30,000,000 of private debt; and it never had had any assessment or taxation of property; and some time would be required to establish and enforce an internal financial system.

In Porto Rico duties on imports were levied and collected by the military authorities pursuant to military orders, and to regulations issued by the President, from its occupation in July, 1898, to May 1, 1900, and thereafter pursuant to the Foraker Act.

In New York duties on imports were levied and collected on articles coming from Porto Rico pursuant to the Dingley Act applicable to "foreign countries," until May 1, 1900, and thereafter pursuant to the Foraker Act.

FEDERAL INSULAR DECISIONS

have been made in a few cases by the United States Supreme Court, not related to the tariff.

1. In the matter of Ramon Baez, petitioner (177 U. S. 378), the Supreme Court, April 12, 1900, declined leave to file a petition for writ of *habeas corpus*, inasmuch as the thirty days for which the petitioner had been sentenced for illegal voting in Porto Rico would expire before the return day.

2. In *Neely v. Henkel* (180 U. S., 109), the Supreme Court, January 14, 1901, sanctioned the extradition of plaintiff, an expostmaster charged with embezzlement at Havana, holding that Cuba was in every sense a foreign country, although held temporarily in the military possession of the United States.

3. In *Huus v. Steamship Company*, the Supreme Court, May 27, 1901, held that vessels plying between Porto Rico and the United States were engaged in coastwise trade in the terms of the Revised Statutes, and plaintiff could not collect pilotage as authorized for services to vessels in the foreign trade. Query: Is the Manila trade also "coastwise?"

THE UNITED STATES SUPREME COURT.

Before proceeding to consider the divergent and conflicting opinions given in the six insular tariff cases recently decided, it is not out of place to recall the legal and personal aspects of the august judicial body, unequalled in power and dignity by any tribunal known to man. The Constitution, after creating the legislative and executive departments of our national government, by its third article provided that: "The judicial power of the United States shall be vested in our Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

They receive appointment by the President, upon the advice and consent of the Senate. By act of Congress, the Court consists of a Chief Justice and eight Associate Justices, and the present incumbents are as follows:

Chief Justice, Hon. Melville Weston Fuller. Born in Maine,

February 11, 1833, graduated by Bowdoin College, 1853, studied at Harvard Law School; became a leading lawyer at Chicago; commissioned December 17, 1888, by President Cleveland.

Associate Justices :

Hon. John Marshall Harlan. Born in Kentucky, June 1, 1833; graduated by Central College in 1850; commissioned April 22, 1878, by President Hayes.

Hon. Horace Gray. Born in Boston, March 27, 1828; graduated by Harvard College in 1845 and at law school in 1849; commissioned January 30, 1882, by President Arthur.

Hon. David Josiah Brewer. Born in Smyrna, Asia Minor; graduated by Yale College in 1856; resided in Kansas; commissioned December 20, 1889, by President Harrison.

Hon. Henry Billings Brown. Born in Massachusetts, March 2, 1836; graduated by Yale College in 1856; resided at Detroit; commissioned December 31, 1890, by President Harrison.

Hon. George Shiras, Jr. Born in Pittsburg, January 26, 1832; graduated by Yale College in 1853; commissioned October 2, 1892, by President Harrison.

Hon. Edward Douglas White. Born in Louisiana, November 3, 1845; ex-United States Senator; commissioned February 19, 1894, by President Cleveland.

Hon. Rufus William Peckham, of New York; born in 1838; commissioned by President Cleveland.

Hon. Joseph McKenna. Born in Philadelphia, in 1843; graduated by St. Augustine College, Benicia, Cal.; resided in San Francisco; commissioned in 1898 by President McKinley.

Each brings to the discharge of his judicial duties wide observation and experience in statesmanship and jurisprudence, and their unapproachable integrity is above the breath of suspicion.

Would an unbiased, intelligent spectator (an Aristotle in dialectics) of a session of such an august and authoritative tribunal presuppose that these nine trained, disinterested judicial minds, upon hearing and considering together a case presented on the same printed record and briefs and oral arguments of advocates, would act with unanimity? Or would he anticipate differences of opinion, and antagonistic conclusions? In the large majority of cases the desirable unanimity is attained, even though it be only by hesi-

tating acquiescence. But our Aristotelian, on profound reflection, would surely recall that humanity from the cradle to the grave is confronted with many varieties of thought, feeling and action, that are to be expected wherever there is freedom of mind and heart. Our venerable, venerated philosopher, Herbert Spencer, in his ninth decade, comes to admit the disappointment of his expectations, and to acknowledge that the immense material gathered through a long lifetime proves insufficient for the solution of the still perplexed difficult problem of the complexity of human nature.

Many causes of differences of opinion among men may be suggested:—as differences of heredity, sex, years, nationality, observation and experience. Thereby is justified the remark, *more Hibernico*, that whenever two persons think precisely alike one has ceased to think.

But after due allowance for such inevitable causes of divergence, there still exist five specific grounds of difference of opinion among intelligent, candid minds, to which in greater or less degree the fruitlessness of controversies, and the divergence of conclusions are attributable:

- 1—Ambiguity of language.
- 2—Misapprehension of the issue.
- 3—Weakness of attention.
- 4—Fear of consequences.
- 5—Biases of association.

Language is but an imperfect medium of conveying thought, rarely attaining mathematical certainty, or more than moral probability. Our English tongue is derived from so many sources, and has so many words of like import, yet differing, that great difficulty is encountered in its use with accuracy and precision. The use of words in different senses engenders the common fallacy of the ambiguity of the middle term. Is it not surprising that the arguments and opinions under present consideration demonstrate the ambiguity of the familiar words, "Citizen," "Subject," "Territory," "State," "Incorporate"? The argument of the Solicitor General claims that the term "United States" is used in the Constitution in no less than *four* distinctly different meanings.

The controversies under present consideration, when reduced to

lowest terms, turn on the meaning of the words "*Foreign Country*" in the tariff act, and "*Uniform throughout the United States*" in the Constitution. Words are said to be the counters of wise men, but the money of fools.

Second—Many discussions and controversies are waged when the parties do not really know what they are talking about. Unless they relate to some proposition affirmed or denied, they may be prolonged like parallel lines *ad infinitum* without convergence. It is incumbent on controversial truth-seekers who are not content with beating the air, to have as soon as practicable, if not at the outset, the subject of controversy clearly stated and apprehended. Forming an issue is the aim and end of legal pleadings, and it is only after a clear apprehension of the subject that much value can be attributed to agreement or disagreement, or to affirmation or denial of a conclusion. Descartes' severe rule of logic is to define all terms, and prove all propositions.

Third—Mental power consists largely in power of attention and concentration. How easily, by the use of a lens, can rays of heat be focused to light a match, or ignite powder; how successfully mountains are laid low in California by streams from hydraulic nozzles; and how terrific the destruction and desolation caused by the compressed air of the tornado. It is told that the German philosopher, Fichte, was so absorbed in his study at Leipzig as to be wholly unaware of Napoleon's great battle raging about the city; and, on stepping into the street for his usual walk, he was amazed to learn that the musketry and cannon had been firing about him all day. How concentrated must be the thoughts of our Edison, who has shown such marvelous power to accomplish in electricity his desired results for light, heat and power. With most minds the thoughts wander—the wits go wool-gathering on the least pretext. It is said no spell-binding orator can control the attention of his entranced audience in rivalry with a flitting bat. We are prone to lose the continuity of thought which is essential to grasp ideas and compare them with others already accepted, and to attain for ourselves satisfactory conclusions. Hence weakness of attention, whether it be weakness in power of concentration, or its non-use, may well be stated as an important cause of weakly-held opinions, and of differing with others.

Fourth—Surely arguments are sometimes to be weighed, and, after acceptance, reconsidered, if they lead to disastrous results. Euclid regarded *reductio ad absurdum*, or *ad impossibile*, ever conclusive. Yet we cannot admire the mental caliber of the timid limb of the law who stoutly refused to admit that two plus two made four until assured what use could be made of the admission. Rather do we cherish the memory of the giant Conkling, who in theory and practice had the courage of his convictions and advocated "hewing to the line, whithersoever might fall the chips." Our great chief justice, Marshall, is said to have resolved problems of constitutional law with an inspired insight, while the classic Story sought for precedent, and contentedly steered from headland to headland of jurisprudence.

Fifth—We are all subject to biases of association or prejudice. This may be good or bad. It is natural and right that we should have respect and deference for the views and convictions of our parents, our teachers and our governmental rulers—for "the *consensus* of the competent." That man is to be pitied who has no anchorage for thought or action based on the past; who, as a doubter, is ever and on every subject adrift. There is a golden mean between being certain of everything and certain of nothing—"unsure of the nose upon one's face." It was, however, a severe statement made by Lord Melbourne that he would be glad to be as sure of anything as Tom Macauley was of everything. Many men are so warped and distorted in their judgments of men and things that it can surely be told in advance just how they will regard a new subject or problem when presented. Few there are who can divert their minds of prejudice and calmly and dispassionately hear and determine what may be presented for their consideration. You might well imagine that our judges who metaphorically sit blind-folded, holding high the scales of justice, would be free from the biases of association. But experience shows quite the contrary.

No clearer illustrations of this can be presented than the divided opinions rendered in the greatest cases waged in our United States Supreme Court within the last half century—the Dred Scott case, the Legal Tender cases, the Income Tax cases, not to mention the

eight to seven decision of the Electoral Commission in the Hayes-Tilden embroglio.

The investigation of the grounds of differences of opinion is worthy of profound study, and is peculiarly appropriate in our consideration of the recent divergent arguments and inharmonious conclusions attained over the simple and familiar words, "foreign" and "United States."

IN THE INSULAR TARIFF CASES

the facts were uncontroverted, inasmuch as each case was presented by demurrer, and the cases turned upon questions of public constitutional law. All parties conceded:

1. That the United States had the right and power to acquire new territories.

2. That this right and power had been duly executed by cession from Spain, and all accepted acquisition as accomplished fact.

3. That the political question of expediency of expansion did not belong to the judicial forum, and it did not enter the debate.

4. That the United States has the right and duty to control and govern such new possessions. Some, however, claimed the right by international law as incident to acquisition, others as derived from the treaty of session, and others claimed it to exist only under the constitutional grant of power to regulate territories.

The main controversies were how far the constitution of the United States applied to such new territories, and what limitations it imposed upon their control and government. The judges of whom I have already spoken, and each and every one of them, are men of high intellectual and moral attainments, with patriotic zeal to maintain their official oaths to support the Constitution and to maintain the exalted position of the court before our country and the world.

The advocates of the government were the able, then Attorney-General of the United States, John W. Griggs, of New Jersey, and the Solicitor-General, John K. Richardson, of Ohio, who were zealous in sustaining the acts and policy of the administration in the orders of the President and the act of Congress, and in advocating a broad and liberal construction of constitutional and governmental powers.

Opposed to them was an array of no less than twenty-six lawyers of New York, Chicago and Washington, who appeared of record in attacking by briefs or oral arguments, or both, the policy and procedure of the Executive and Legislative departments. Among them were some of the most eminent living constitutional lawyers and jurists, of whom mention may well be made of the distinguished Hon. John B. Henderson, ex-senator from Missouri, Hon. John G. Carlisle, ex-senator from Kentucky, and ex-secretary of the Treasury, Hon. William G. Choate, ex-United States District Judge (a brother of our Minister to the Court of St. James), and Hon. Frederick R. Coudert, Jr., of New York, together with Hon. Charles F. Manderson, ex-senator of Nebraska, who appeared with others on behalf of the industrial interests in the States, presumably beet sugar and tobacco, fearing insular competition. All pending cases involving insular questions were at the last term advanced for hearing together, by reason of their public importance, and they were argued in December and January last past, and final decisions were rendered after more than four months deliberation, on the 27th day of May, in six cases as follows:

- 456—*De Lima vs. Bidwell* (N. Y. Collector). Reversed per Brown, J. Dissenting opinions by McKenna and Gray, JJ. Shiras and White, JJ., concurring in dissent.
- 340—*Goetze vs. United States*. Reversed per Brown, J., on authority of *De Lima* decision.
- 515—*Crossman vs. United States*. Reversed per Brown, J., on same authority—the imports having come from Hawaii.
- 507—*Downes vs. Bidwell* (N. Y. Collector). Affirmed per Brown, J., with concurring opinions by Gray and White, JJ. Dissenting opinions by Fuller, C. J., and Harlan, J. Brewer and Peckham JJ., concurring in dissent.
- 501—*Dooley vs. United States*—Reversed per Brown, J. Dissenting opinion by White, J. Gray, Shiras and McKenna JJ., concurring in dissent.
- 509—*Armstrong vs. United States*. Reversed per Brown, J., on authority of *Dooley* decision.

THE UNDECIDED CASES

are two, argued, submitted and held under advisement, viz:

- 419—*Fourteen Diamond Rings vs. United States*. Involving the question of right of seizure and forfeiture of jewels

brought by a U. S. soldier from Manila to Chicago without payment of duty.

502—Dooley vs. United States. Involving the question of recovery of duties collected at San Juan, Porto Rico, on articles shipped from New York after the Foraker Act took effect.

THE FIVE DIFFERENT PORTO RICAN DUTIES COLLECTED WERE:

1. On imports to New York from Porto Rico during its military occupation after the protocol, before the ratification of the treaty. Legality involved in Armstrong case, and sustained.

2. On imports to Porto Rico from New York during military occupation, before the Foraker Act took effect. Legality involved in Armstrong and first Dooley cases, and sustained.

3. On imports to New York from Porto Rico after the ratification of treaty, before the Foraker Act took effect. Legality involved in De Lima case, and *not sustained*.

4. On imports to New York from Porto Rico after the Foraker Act took effect. Legality involved in Downes case, and sustained.

5. On imports to Porto Rico from New York after the Foraker Act took effect. Legality involved in second Downes case, yet undecided.

I.

THE DE LIMA CASE.

The Court first passed on the validity of the above stated third class of duties, holding them unlawful.

De Lima and Company sued Bidwell in the Supreme Court of New York for the recovery of duties exacted by defendant as U. S. Collector of Customs at New York under the Dingley Tariff Act, and paid under protest, on importation of sugar from Porto Rico in the autumn of 1899, after its cession by Spain, but before the Foraker Act took effect. After removal of the case to the U. S. Circuit Court, the defendant demurred to the complaint on grounds of:

1. Want of jurisdiction.
2. No cause of action stated.

The demurrer was sustained on the latter ground, and the case dismissed. Townsend, U. S. District Judge, rendering the opin-

ion that the duty was lawfully collected, and could not be recovered.

In the United States Supreme Court the plaintiff's contentions were (as were also those of Goetze in his similar case), substantially as follows:

1. The United States acquired by cession from Spain, under the treaty of Paris, permanent and exclusive control and dominion over the island of Porto Rico, which then ceased, within the meaning of the Dingley Tariff Act of 1897, to be a "foreign country."

2. The treaty of Paris did not intend or mean that Porto Rico should be governed as a foreign country without regard to Constitutional restrictions.

3. The treaty of Paris, in so far as it might be construed to have such intent or meaning, would be in violation of the Constitution, and be void.

4. Upon the acquisition of Porto Rico, the United States Government, being one of delegated powers, could only exercise therein the restricted powers conferred by the Constitution, and not unrestricted powers at its own will.

5. Porto Rico, upon its acquisition by the United States, was annexed thereto, and became a part thereof, within the meaning of the Constitutional provision requiring that duties levied by Congress "shall be uniform throughout the United States."

6. The continued application of the existing Dingley Tariff Act to imports from Porto Rico after its acquisition and annexation to the United States, was unlawful, and duties so exacted from plaintiffs are recoverable back.

In the arguments, claims were strenuously made that, "Constitutional limitations are the ubiquitous concomitants of Constitutional powers;" that the Constitution extends to acquired territory on its cession, automatically, *eo instante, ipso facto, ex proprio vigore*; that the Constitution everywhere and always follows the Flag. Otherwise, beware the fate of Rome!

Contra. The contentions of the Government in behalf of the defendant collector, were in substance as follows:

1. That it is an ordinary and necessary power of an independent Nation to accept the cession of foreign territory upon such terms

and conditions relative to its status as may best serve the interests of such nation.

2. That the United States, through its constitutional treaty making agencies, lawfully acquired the island of Porto Rico and the Philippine Islands by the treaty of Paris, which did not intend to make said acquired islands integral parts of the United States, but intended in several particulars to reserve their final status for the determination of Congress.

3. That the intention not to constitute said islands integral parts of the United States is shown by said treaty's peculiar and special provisions for variations and exceptions as to customs on Spanish goods.

4. That the Tariff Act of 1897 applied to merchandise imported from Porto Rico and the Philippine Islands after their cession by Spain exactly as it did before.

5. Therefore that the duties in question were lawfully levied and collected by the defendant as approved by the board of appraisers and confirmed by the ruling of the United States Circuit Court.

In support of these points, it was argued in behalf of the government that to say that the constitution follows the flag everywhere and always is but a half truth. It does in some respects, but does not and cannot in all respects. In begetting a nation, our fathers did not bring forth a government as misshapened as Richard, the Hunchback:

"Deformed, unfinished, sent before its time
Into this breathing world, scarce half made up,
And that so lamely and unfashionable
The nations laugh at us as we halt them by."

The respective parties in this case, as also in the cases of Goetze and Crossman, presented voluminous briefs with numerous citations and quotations bearing upon the constitutional questions and the executive and judicial precedents relating to the former territorial acquisitions. All relied on C. J. Marshall as supreme authority, and fell back on C. J. Taney when helpful.

May 27th, the court rendered its decision per Mr. Justice Brown, who, after sustaining the jurisdiction, announced: "This case raises the single question, whether the territory acquired by

the United States by cession from a foreign power remains a 'foreign country' within the meaning of the tariff laws." This question was answered in the negative, that Porto Rico was *not* such foreign country after its cession; and the case was reversed.

The opinion of the Court disposes of the earnest contentions of the Government, that it never could have been the intention to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent domestic territory, it still remains a "foreign country" under the tariff laws, until Congress has embraced it within the general revenue system. This is done by a review of the judicial precedents in cases arising from the acquisition of Louisiana, Florida, Texas, California and Alaska. The conclusion is attained: "From this resume of the decisions of this Court, the instructions of the executive departments, and the above Foraker Act of Congress, it is evident that from *Marbury vs. Madison* (1803) to the present time, there is not a shred of authority, except the dictum in *Fleming vs. Page* (9 How. 603) practically overruled in *Cross vs. Harrison*, 16 How. 164), (for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country."

"But," proceeds the opinion, "were this presented as an original question, we should be impelled irresistibly to the same conclusion."

In substance, the opinion proceeds: "The Constitution controls both laws and treaties, and there is no distinction as to supremacy between them. One of the ordinary incidents of a treaty, especially after victorious war, is the cession of territory, which is thus acquired as absolutely as by an act of Congress. The right to acquire involves the right to govern and dispose of it. Hence by the treaty of Paris, Porto Rico became territory of the United States, and is subject to the disposition of Congress."

Territory thus acquired can remain a foreign country under the tariff laws only on the theory that, because it was foreign when such laws were enacted, they do not apply; or on the theory that it remains foreign under the tariff laws until Congress has formally embraced it within the customs union of the States. The first theory is inconsistent with reason and practice, as per several illustrations. While a statute is presumed to speak from the time of

its enactment, it embraces all such persons and things as subsequently fall within its scope.

By the second theory, a country may at the same time be domestic for one purpose and foreign for another,—an assumption unwarranted by the Constitution, and its adoption by this court would be “pure judicial legislation.”

“We are therefore of opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States; that the duties were illegally exacted, and the plaintiffs are entitled to recover them back.”

The dissenting opinion of Mr. Justice McKenna (with whom concurred Shiras and White, JJ.), takes the grounds:

That Porto Rico after its cession occupied a relation to the United States *between* that of being a foreign country absolutely, and of being a domestic territory absolutely. [I suggest that makes tobacco raising Porto Rico a *tertium quid*]. And because of that intermediate relation its products remained subject to the duties imposed by the Dingley Act. This is demonstrable from the Constitution itself, the immediate and continued practice under the Constitution, judicial authority and the treaty with Spain.

And this demonstration vindicates our government from national and international weakness, and exhibits the Constitution as a charter of great and vital authorities, with limitations indeed, but with such limitations as serve and assist government, not destroy it; which, though fully enforced, yet enable the United States to have what it was intended to have—“an equal station among the powers of the earth,” and “to do all acts and things which independent states may of right do.”

Mr. Justice Gray expressed his dissent in a short opinion holding the judgment to be irreconcilable with the unanimous opinion in *Fleming v. Page* (1849) and with the opinions of the *Downes* case just decided.

II.

THE DOWNES CASE.

Next the court passed on the validity of the above stated fourth class of duties, collected after the treaty and under the Foraker

Act, holding them lawful, which is the most important and far-reaching of the decisions rendered.

Downes sued Bidwell in the United States Circuit Court for the recovery of duties paid under protest exacted by defendant as United States Collector of Customs at New York on importations of oranges from Porto Rico subsequent to the taking effect of the Foraker Act, May 1, 1900, claiming that said oranges were not liable to any duty—the same not having been imported from any foreign country within the meaning of any *valid* statute or executive order of the United States; but were merchandise which must, under and by virtue of the Constitution of the United States in that regard, be admitted to free entry in any port of the United States.

The complaint was met by defendant's demurrer on the grounds:

1. Want of jurisdiction.
2. No cause of action stated.

The demurrer was sustained by the Circuit Court on the second ground, and suit was dismissed.

In the Supreme Court the plaintiff's contentions were:

1. That Porto Rico, after its cession by Spain, was not a "foreign country" as to the existing Dingley Act of 1897.
2. That the Porto Rico Tariff Act, known as the Foraker Act, approved April 12, 1900, was in violation of the clause of the Constitution requiring "taxes, duties, imposts and excises shall be uniform throughout the United States."

Thereupon it was argued for plaintiff that to every civilized government all territory is either foreign or national; that there is under our Constitution no intermediate state between foreign and national; that Porto Rico by its cession became national within constitutional protection, requiring uniformity of duties throughout the United States; that Congress could not violate the limitation on its power to levy duties with uniformity; "that issuing imperial ukases ill comports with passing constitutional laws."

Contra, it was argued for the Government:

"The government of the United States has been vested, not with all powers, but only with certain particular powers, which are in some respects limited and confined in scope and operation, but in other respects they are entirely unlimited. So that the real and

practical question is whether there is any limitation preventing the particular thing here complained of."

"We mean no more than this Court meant when it said:

'The power of Congress over the territories is complete.'

'Its sovereignty over them is complete.'

'It has full and complete legislative authority over the people of the territories and all departments of the territorial government.'

"In legislating for the territories Congress would doubtless be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather in inference and the general spirit of the Constitution, than by any express and direct application of its provisions."

May 27th, the Court rendered its decision per Mr. Justice Brown, who, after sustaining the jurisdiction, announced that the ruling of the Circuit Court sustaining the validity of the Foraker Act and the legality of the 15 per cent. tax collected thereunder was affirmed. The opinion proceeds to say: "This case involves the broad question, whether the revenue clauses of the Constitution extend by their own force to our newly acquired territories. As the Constitution itself does not answer the question, its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress and in the decisions of this Court." The opinion proceeds fully to review the origin and nature of our government in its inception, the construction put upon its powers over existing territories, and subsequently acquired territories of the District of Columbia, Louisiana, Florida, California and the divers decisions relating thereto. Confessing that, "the decisions of this Court upon this subject have not been altogether harmonious, and that many expressions when isolated require qualification," the opinion says:

"Eliminating then from the opinions of this court all expressions unnecessary to the disposition of the particular case, and gleanings therefrom the exact point decided in each, the following propositions may be considered as established:

"1. That the District of Columbia and the territories are not

States within the judicial clause of the Constitution giving jurisdiction in cases between the citizens of different States;

"2. That territories are not States within the meaning of Revised Statutes, Sec. 709, permitting writs of error from this court in cases when the validity of a *State* statute is drawn in question;

"3. That the District of Columbia and the territories are States, as that word is used in treaties with foreign powers, with respect to the ownership, disposition and inheritance of property;

"4. That the territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish;

"5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully provide for such trials before consular tribunals without the intervention of a grand or petit jury;

"6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith."

These propositions seem to be fully concurred in as settled law, but not controlling this case.

The Dred Scott decision is then analyzed, showing that the Circuit Court had no jurisdiction because Scott, by reason of his African race, was not a citizen of Missouri. Yet the court proceeded to pass on the question whether Scott, who was born a slave, had acquired freedom by having been taken by his owner and kept four years in Illinois and Minnesota territory. In passing upon the merits, Chief Justice Taney held "that the territorial clause of the Constitution was confined to the territory which belonged to the United States at the time the Constitution was adopted, and did not apply to territory subsequently acquired from a foreign government." The opinion proceeds:

"When the Constitution declares that all duties shall be uniform throughout the United States, it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the United States, by which term we understand the *States* whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them."

The practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall direct.

"We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall, in *Loughborough vs. Black*, 5 Wh., 317, termed the 'American Empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious."

"Large powers must necessarily be intrusted to Congress. * * * It is never conclusive to argue against the possession of certain powers from possible abuses of them."

Congress ascertained that the island has never had any system of property taxation, and it would take two years to put one into operation, and to undertake to collect our internal revenue tax would not only be ineffectual, but destroy the good will of that people for the United States.

"To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only throughout the United States, or among the several states. * * * We do not wish however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local character."

Finally: "We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is Constitutional so far as it

imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case. Whereupon the decision below is *Affirmed*."

A further opinion was given by Mr. Justice White, with whom concurred Shiras and McKenna, JJ., uniting in the judgment of affirmance. The conclusion attained by Mr. Justice Brown is reached by a different course of reasoning, in substance as follows:

"It is undoubtedly settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken line of decisions of this court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, and that it may insert in a treaty conditions against immediate incorporation; and that, on the other hand, when it has expressed in the treaty the conditions favorable to incorporation, they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that where the treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is that the acquired territory has reached that state where it is deemed proper that it should enter into and form a part of the American family."

The treaty of Paris does not stipulate for incorporation, but, on the contrary, expressly refers the status of the inhabitants to the determination of Congress.

"The result is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the

United States after the cession was within the power of Congress, and that body was not moreover, as to such impost, controlled by the clause requiring that imposts should 'be uniform throughout the United States.' " Hence the duty under said act was lawful.

Mr. Justice Gray also gives a concurring opinion, quoting Marshall, C. J., in the *Canter* case (1828) 1 Pet, 511, 542.

"The Constitution confers absolutely on the government of the union the powers of making war, and of making treaties: consequently that government possesses the power of acquiring territory either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose."

The territory acquired by cession is subject to the governmental disposition of the United States government, consisting of the President, the Senate elected by the states, and the House of Representatives chosen by and immediately representing the people of the United States. This is clearly recognized by the treaty with Spain, which expressly refers the status of the inhabitants to the determination of Congress. So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory in the sense of the revenue laws. But those laws concerning "foreign countries" remain applicable to the conquered territory until changed by Congress. Such was the unanimous opinion of this court, as declared by Chief Justice Taney in *Fleming v. Page*, 9 How. 603-617. Congress may establish a temporary government, and the system of duties established by the Foraker Act during the transition period was within the authority of Congress under the Constitution of the United States, and is valid.

Contra. A dissenting opinion was given by Chief Justice Fuller, Brewer and Peckham JJ., concurring. He said, in substance: "From *Marbury vs. Madison* (1803) to the present day, no utterance of this Court has intimated a doubt that in its operation

on the people by whom and for whom it was established, the national government is a government of enumerated powers, the exercise of which is restricted to the use of means appropriate and plainly adapted to constitutional ends, and which are 'not prohibited, but consist with the letter and spirit of the Constitution.' "

The powers given Congress to levy duties are restricted to uniformity throughout the United States, and this uniformity is a *geographical uniformity*, only attained when the tax operates with the same force and effect in every place where the subject is found. Taking the words in their natural meaning, no reason is perceived for disagreeing with Chief Justice Marshall in the view that they were used in this clause to designate the geographical unity known as "The United States"—"our great republic which is composed of states and territories"—neither political considerations nor expediency can govern us in maintaining a treaty or statute in violation of the Constitution. This statute violates the uniformity of taxation to which the power of Congress was restricted, and hence was void.

Mr. Justice Harlan adds a further opinion, concurring with the chief justice. He said he agreed in holding that Porto Rico—at least after the ratification of the treaty with Spain—became a part of the United States within the meaning of the section of the Constitution enumerating the powers of Congress, and providing that "all duties, imposts and excises shall be uniform *throughout the United States*." He criticises some of the positions and expressions in the opinions of the majority and predicts that when the principles announced prevail "we will pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism." "The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the government in order to meet what some may suppose to be extraordinary emergencies." "How Porto Rico can be domestic territory of the United States as distinctly held in *De Lima vs. Bidwell*, and yet, as is now held, not embraced by the words 'throughout the United States,' is more than I can understand." Porto Rico became a part of and

subject to the jurisdiction of the United States in respect of all its territory and people. The Foraker Act practically incorporated it as a part of the United States, but transcended its constitutional powers in seeking to impose a duty not "uniform throughout the United States."

III.

THE DOOLEY CASE.

The Court lastly passed on the validity of the above stated second class of duties, viz: Imports to Porto Rico from New York, before the Foraker Act took effect. The Court holds the part collected under military orders before the treaty to be legal, and the part after the treaty before the Foraker Act took effect (under the ruling of the *De Lima* case) to be unlawful.

Dooley sued the United States for recovery of duties paid by him on imports at San Juan, Porto Rico, from New York, between July 26, 1898, and May 1, 1900.

The complaint was met by demurrer on the grounds of:

1. Want of jurisdiction.
2. No cause of action stated. Dismissed below on the latter ground.

Mr. Justice Brown, in delivering the opinion of the Court, after sustaining the jurisdiction, in substance said: The exaction of duties under the war power prior to the ratification of the treaty of peace, admits of no doubt. Halleck's *International Law* sustains it as sanctioned by all publicists, as do also the precedents of this Court. In *Cross vs. Harrison*, this Court upheld the validity of duties exacted by the military commander of California upon imports from foreign countries. "The right to exact duties upon goods imported from New York arises from the fact that New York was still a foreign country with respect to Porto Rico, and from the correlative right to exact duties upon merchandise imported from that island."

But "different considerations apply with respect to duties levied after the ratification of the treaty, and the cession of the island to the United States. Porto Rico then ceased to be a foreign country, and as we have just held in *De Lima vs. Bidwell*, the right of the collector of New York to exact duties upon imports from that island ceased with the exchange of ratifications."

"In our opinion the authority of the President, as commander-in-chief, to exact duties upon imports from the United States, ceased with the ratification of the treaty of peace, and the right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject."

Judgment below was affirmed as to duties collected before the treaty of peace, and reversed as to those collected thereafter, and the case was remanded.

Contra. Mr. Justice White, in a dissenting opinion (Gray, Shiras and McKenna, JJ., concurring), in substance says: That he concurs in the decision upholding the collection of duties by the military authority prior to the treaty of peace, but dissents from the overthrow of such collections after the treaty. The importance of the subject lead him to ask how Porto Rico, from being a foreign country, amenable to the military tariff orders, became domestic by the treaty of peace, to be made foreign again by act of Congress, and subject to duties not uniform throughout the United States. To hold that the status of the ceded territory as previously existing was *ipso facto* changed within the meaning of the tariff laws of the United States without the action of Congress is to deprive that body of the rights which the stipulations of the treaty sedulously sought to preserve. Giving the treaty self operating force to affect existing tariff laws overthrows the authority conferred on Congress by the Constitution.

THE FINAL RESULTS.

1. The duties on imports at New York on goods from Porto Rico, under military orders and the regulations of the President, prior to the ratification of the treaty, were lawful.
2. The duties on imports at San Juan, Porto Rico, on goods from New York, under military orders and the regulations of the President, prior to the ratification of the treaty were lawful.
3. The duties on imports at New York on goods from Porto Rico, after the ratification of the treaty (April 11, 1899), and before the Foraker Act took effect (May 1, 1900,) were *unlawful*.
4. The duties on imports at New York on goods from Porto Rico, under the Foraker Act (May 1, 1900,) were lawful.

The Court gave no intimation why it held under advisement undecided (1) the second Dooley case, as to imports at Porto Rico from New York after the treaty; and (2) the fifteen diamond rings case, as to duties on imports from Manila. It probably was out of abundant caution in view of the disturbed condition of the Philippines, and the importance of the precedents to be established.

It may be asked, will these decisions stand and be adhered to as precedents? As the full bench of nine justices participated in the hearing and deliberation on these cases, and their decision, upon full oral and printed argument, there is no reason to anticipate that results will be reconsidered, or that they will not be substantially adhered to. The treaty-making powers, the executive and legislative, are thereby sustained by the judiciary, and most important principles of our balanced Government have, as I believe, been finally established.

The future has many more questions of rights and duties connected with our new acquisitions sure to arise for the solution of our statesmen and jurists for years to come on the basis of these decisions.

IN CONCLUSION.

We greatly regret the manifest absence of judicial harmony, but it is a subject of congratulation by our country that the conflict of opinions among the eminent patriotic jurists who rendered them reveals no line of cleavage of a partisan or political nature.

The three justices appointed by President Cleveland disagreed, as did the three appointed by President Harrison. The two Harvard men were at outs, as were the three Yale men, one wielding the balance of power. The two tallest as they stand and longest on the bench were also at outs. The oldest and youngest in years agreed, as did the oldest and youngest in commission. The four from Boston, Pittsburg, New Orleans and San Francisco agreed. We would throw no X-ray on the consultation chamber, but we divine that our judicial knights must have had a lively tournament, viewing from different angles the shield of the Constitution.

Applying my grounds of difference of opinion, I submit that the judicial conflict is referable to some degree of each of my above five points:

1. Ambiguity of language.
2. Misapprehension of the issue.
3. Weakness of attention.
4. Fear of consequences.
5. Biases of association.

And it would be an interesting psychological study to subject the voluminous arguments and opinions to rigid analysis to discover how far these grounds were applicable.

It is with hesitation I meet your reasonable expectation that I should declare my own views and conclusions in the premises. If in the foregoing presentation of my subject, I have disclosed any partisan bias, or leaning toward so-called imperialism or anti-imperialism, I have failed in my purpose. Were my humble conclusions to have any special weight, I should feel that the intricate and important subject demands as many weeks as I have devoted days to the careful study of the many citations by counsel and by the Justices in their elaborate opinions. Yet, I am prepared to say that my opinions concur on mooted points with those of Justices Gray, Shiras, White and McKenna. In brief, I think:

1. That the treaty-making power is co-ordinate, in a different field of action, with the law-making power, and both are subordinate to the Constitution.

2. That the customs duties collected under the order of the military and executive orders until the proclamation of the treaty of peace, were lawful.

3. That the treaty of peace did not *ipso facto* repeal by necessary implication the application of the existing tariff laws to Porto Rico, but they remained in effect subject to the control of Congress, according to the terms both of the treaty and of the Constitution.

4. That the acquisition of Porto Rico by the treaty did not constitute it such integral part of the United States as to require uniformity of tariff laws relative thereto; hence, the Foraker Act was constitutional, and the duties collected thereunder were valid.

If asked in conclusion, the question I put to you at outset, "Does the Constitution follow the Flag?" I would say, as I believe every Justice on the Supreme Bench, and every considerate lawyer would, on reflecting, "Yes and No." In some respects, as re-

gards some rights and limitations, "Absolutely Yes," but as regards some relative and governmental rights and powers, "No, because some Constitutional provisions can have no adaptation to the new territorial environment." No one seriously maintains that *every* Constitutional provision can apply to territorial possessions, and *contra*, no one seriously maintains that *none* so apply. It is only on the line of demarkation between the applicable and the inapplicable provisions that there is substantial ground for debate—and this line is determinable as problems arise, successively by the executive, legislative and judicial departments of our government, in the light of wisdom and experience. We are making history rapidly, and I have full faith in our American people and their selected servants. I entertain no more fear that our beloved country will re-enact the tragedy of the "Decline and Fall of the Roman Empire," than that manifest destiny will bring all the Eastern and Western hemispheres under our sway. The bright lexicon of our youthful nation—whatever be its problems to solve—has no such word as Fail.

PAPERS READ.

<i>Year.</i>	<i>Writer.</i>	<i>Subject.</i>
1894.....	John Arthur.....	President's Address — "Lawyers in Their Relations with the State.
"	R. A. Ballinger	"Our Community Property Laws."
"	Frank H. Graves.....	"Non-Partisan Selection of the Judiciary."
"	Thomas Carroll.....	"Policy of Redemption Laws."
"	John W. Pratt.....	"Government of Cities."
"	Charles S. Fogg.....	"Evils of the Promiscuous Appointment of Receivers."
"	James B. Reavis.....	"Our Exemption Laws."
"	Frank T. Post	"The Material Man's Lien."
o "	Orange Jacobs.....	"Reminiscences of the Bench and Bar of Washington."
1895.....	George M. Forster	President's Address.
"	George Turner.....	"Practice and Procedure in the State of Washington."
"	Charles O. Bates.....	"Juries and Jury Trials."
"	David E. Baily.....	"Stare Decisis."
"	C. H. Hanford	"Jurisdiction of American Courts, State and Federal."
"	John J. McGilvra.....	"The Pioneer Judges and Lawyers of Washington."
1896.....	Charles S. Fogg.....	President's Address—"The Law and Lawyer in History."
"	T. N. Allen.....	"Judicial Legislation."
"	N. T. Caton	"Pioneer Judges and Lawyers."

<i>Year.</i>	<i>Writer.</i>	<i>Subject.</i>
1896.....	Emmett N. Parker.....	"Probate Law and Practice in Washington."
"	George Donworth.....	"Corporations."
"	R. S. Holt	"Contributory Negligence."
"	James Z. Moore.....	"Landlord and Tenant."
"	Alfred Battle	"Record Notice and Curative Acts."
"	W. T. Dovell	"Bench and Bar."
1897.....	Harold Preston	President's Address.
"	E. B. Leaming.....	"Philosophy of the Law."
"	W. H. Pritchard	"The Policy and Practical Effect of Usury Laws."
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1900.....	George Donworth.....	President's Address—"The Passing of Precedent."
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".....	Herbert S. Griggs.....	"Admiralty Practice."
".....	Charles E. Shepard.....	"Limitations on Municipal Indebtedness."
".....	C. W. Hodgdon.....	"Government Ownership of Railroads."
".....	J. B. Davidson.....	"Needed Reforms in the Laws of Marriage and Divorce."
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